(13)

No. 06-6407

In The Supreme Court of the United States

SCOTT LOUIS PANETTI,

Petitioner,

v.

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX VOLUME I

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Petition For A Writ Of Certiorari Filed September 6, 2006
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216TH JUDICIAL DISTRICT COURT
GILLESPIE COUNTY, TEXAS
DOCKET NO. 3310
STATE v. PANETTI

12/10/2003	Defendant's Motion to Determine Competency to Be Executed.
12/23/2003	Order Denying Applicant's Motion to Determine Competency to Be Executed.
2/4/2004	Scott Panetti's Renewed Motion to Determine Competency to Be Executed.
2/19/2004	*Ex parte* Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings.
2/19/2004	Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings.
2/19/2004	Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of Ford.
2/19/2004	*Ex parte* Motion for Prepayment of Funds to Hire an Investigator to Assist Defense Counsel.
2/19/2004	Motion for Member of Defense Team to Be Present During Expert Examinations of Scott Panetti.
2/19/2004	Defendant's Motion asking Court to Refrain from Setting New Execution Date.
2/19/2004	Defendant's Motion for Discovery.

2/19/2004	Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts.
2/19/2004	Motion to Transcribe All Proceedings Related to Competency Determination under Article 46.05.
2/19/2004	Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti.
2/26/2004	Order (granting Renewed Motion to Determine Competency to Be Executed, staying execution, and appointing Dr. Mary Anderson and Dr. George Parker to examine defendant).
3/4/2004	Defendant's Motion to Reconsider.
3/15/2004	Order to Disclose Records.
4/1/2004	Order Compelling Production of Documents.
4/8/2004	Order Compelling Production of Documents.
4/28/2004	Joint Report of Drs. Parker and Anderson.
5/14/2004	Letter to counsel from Judge Stephen Ables (noting appointed experts' opinion that Mr. Panetti is competent and ordering Mr. Panetti's counsel to file any other matters by 5/21/04)
5/21/2004	Scott Panetti's Objections to Experts' Report, Renewed Motion for Funds to Hire Mental Health Expert and Investigator, Renewed Motion for Appointment of Counsel, and Motion for Competency Hearing (File Stamped May 24, 2004).
5/26/2004	Order Regarding Competency to be Executed.

US DISTRICT COURT
WESTERN DISTRICT OF TEXAS (AUSTIN)
CIVIL DOCKET NO. 1:04-CV-042
PANETTI v. DRETKE

Date Filed	#	Docket Text
01/26/2004	1	Petition by Scott Louis Panetti for writ of habeas corpus raising ripe claim of incompetency to be executed.
01/26/2004	2	Motion by Scott Louis Panetti to stay execution (scheduled 2/5/04).
		* * *
01/28/2004	3	Order denying motion to stay execution (scheduled 2/5/04).
01/30/2004	4	Motion by Doug Dretke to dismiss petition for writ of habeas corpus raising ripe claim of incompetency to be executed.
		* * *
01/30/2004	6	Motion by Scott Louis Panetti to appoint expert (psychiatrist).
01/30/2004	7	Motion by Scott Louis Panetti for reconsideration (Court's order dated 1/28/04 on motion to stay).
01/30/2004	8	Second Motion by Scott Louis Panetti to stay execution.
01/30/2004	9	Order denying motion to stay execution, granting motion for reconsideration (Court's order dated 1/28/04 on motion to stay), denying motion to appoint expert (psychiatrist).

02/04/2004	10	Second Motion by Scott Louis Panetti for reconsideration.
02/04/2004	11	Order granting motion for reconsideration, granting motion to stay execution for 60 days to allow state court to reconsider his motion u.. :er Article 46.05 of Texas Code of Criminal Procedure challenging his competency to be executed in light of evidence of Panetti's current incompetency to be submitted to this and the state court.

* * *

06/07/2004	15	Order that petitioner is granted 15 days to prepare motions related to his incompetency-to-be-executed claim.
06/21/2004	16	Motion by Scott Louis Panetti for appointment of counsel.
06/21/2004	17	Motion by Scott Louis Panetti for authorization of funds for expert and investigative assistance, statement of the need for confidentiality, and for leave to seal ex parte application for funds.
06/21/2004	18	Motion by Scott Louis Panetti for discovery.
06/21/2004	19	SEALED Motion by Scott Louis Panetti for authorization of funds for expert assistance.
06/21/2004	20	SEALED Motion by Scott Louis Panetti for authorization of funds for investigative assistance.

07/01/2004	21	Response by Doug Dretke in opposition to motion for authorization of funds for investigative assistance, motion for authorization of funds for expert assistance, motion for discovery.
07/12/2004	22	Order ... hearing [on] motion for authorization of funds for investigative assistance for 10:00 7/19/04, motion for authorization of funds for expert assistance for 10:00 7/19/04, motion for discovery for 10:00 7/19/04, motion for authorization of funds for excerpt and investigative assistance, statement of the need for confidentiality for 10:00 7/19/04, motion for leave to seal ex parte application for funds for 10:00 7/19/04, motion for appointment of counsel for 10:00 7/19/04, motion to dismiss petition for writ of habeas corpus raising ripe claim of incompetency to be executed ... for 10:00 7/19/04.

* * *

07/20/2004	23	Order granting motion for discovery subpoenas duces tecum to be issued to TX Dept. of Criminal Justice and Gillespie County, Kerry [sic] County and Bell County Jails.
07/20/2004	24	Order denying motion to dismiss petition for writ of habeas corpus raising ripe claim of incompetency to be executed ... , granting motion for appointment of counsel, granting motion for authorization of funds for expert and investigative assistance,

		statement of the need for confidentiality, granting motion for leave to seal ex parte application for funds, granting motion for authorization of funds for expert assistance, granting motion for authorization of funds for investigative assistance, setting evidentiary hearing for 9:30 8/23/04.
		* * *
08/11/2004	31	Motion by Scott Louis Panetti for discovery and subpoenas of files of state appointed experts.
		* * *
08/19/2004	34	Order granting motion for discovery and subpoenas of files of state appointed experts, that clerk issue subpoena for Dr. George Parker . . . , for Dr. Mary Anderson . . . , that petitioner provide clerk with addresses for Dr. Parker and Dr. Anderson . . . .
		* * *
09/07/2004		Evidentiary hearing held; to continue 9/8/04.
		* * *
09/08/2004		Evidentiary hearing held; concluded; supplemental briefs in 2 or 3 days.
		* * *
09/10/2004	41	Post-Hearing Brief by Scott Louis Panetti.
09/29/2004	42	Order denying petition for writ of habeas corpus and staying case pending outcome of appeal.
		* * *

10/21/2004	43	Notice of appeal by Scott Louis Panetti.
10/21/2004	44	Motion by Scott Louis Panetti for certificate of appealability.

* * *

11/29/2004	47	Order granting in part as to Issue One of the Motion for Certificate of Appealability; Denied as to Issue Two of the Motion for certificate of appealability.

* * *

US COURT OF APPEALS FOR THE FIFTH CIRCUIT
DOCKET NO. 04-70045
PANETTI v. DRETKE

3/14/05	Appellant's Brief filed by Appellant Scott Louis Panetti.
	* * *
3/21/05	Amicus curiae brief filed by . . . Advocacy Inc., Mental Health [Association in Texas], . . . National Alliance [for the Mentally Ill], . . . Texas Appleseed.
	* * * *
5/16/05	Appellee's Brief filed by Appellee Doug Dretke.
6/1/05	Reply brief filed by Appellant Scott Louis Panetti.
	* * *
12/13/05	Oral argument heard.
5/9/06	Opinion filed.
5/9/06	Judgment entered and filed.
5/22/06	Petition filed by Appellant Scott Louis Panetti for rehearing en banc.
6/8/06	Court Order filed denying petition for rehearing en banc
6/16/06	Mandate issued.
	* * *

DEFENDANTS EXHIBIT 44

9-20-95

E. LEE SIMES, M.D. (512) 997-8773

PSYCHIATRY 150 E. Main, Suite 202
Fredericksburg, Texas 78624

PSYCHIATRIC EVALUATION

11-6-92

Patient: Scott Louis Panetti

Requesting Agency: Judge Steve Ables
216th Judicial District
Gillespie County, Texas

Source of Information: Interview with Scott Louis Panetti.

Reason For Evaluation: Court ordered to determine competency to stand trial.

Present History: Mr. Panetti is a 34 year old male seen at the Fredericksburg jail and examined for competency to stand trial. The interview was focused upon the issue of competency, so much background information at this time was not obtained. Mr. Panetti stated that he is in jail charged with two capitol [sic] murder offenses. When asked to explain the meaning of capitol murder he states "it is as if you have killed a policeman", and elaborated that it was an important type of murder. He seemed to grasp the severity of the charges against him.

Mr. Panetti initiated the conversation by stating that "Scott is away". He then described "Will" being here. "Will" he described is his mediator. He also described a persona called "Wounded Sun Bird", which evidently is evidenced by a tattoo which he has. He knew that he was in jail and that the jail was located in Fredericksburg. He knew that the date was close to All Saints Day, but felt that it was

1991. He knew that he had entered the jail sometime at the end of August or first of September. While he did not graduate from high school he did receive a GED. He stated that he could read and write and writes poetry as a hobby. He felt that the President was Reagan, but knew the Vice-President was someone who they "make jokes about". He knew that his parents were dairy farmers and that part of his family holdings included a dairy farm in Wisconsin. He himself, he states, has mainly made a living as a cowboy for most of his adult life. He described himself as anxious, frustrated, depressed and somewhat hopeless about the future. He states that he spends most of his time studying the Bible and then would begin describing various passages in the Bible which relate to him. This religiosity appeared to have delusional significance. He spoke much about his problem with alcohol and that he had been involved in AA for many years. He also described a mental disorder and that he was on medications. A subsequent list of medications from the jail staff included: Perphenazine 4 mg. 2 tablets three times a day, 8 tablets at bedtime; Temazepam 15 mg. 1-2 at bedtime; Benztropine 2 mg. 1 at bedtime; Amitriptyline 25 mg. 4 at bedtime; Erythromycin 2 percent topical solution every 12 hours. The physicians name on the bottles was Dr. Lennhoff. He states that his psychiatric disorders have led to several hospitalizations. He also states that alcohol is a significant problem and related this to a persona named "Sarge". He described the character "Will" as the mediator between Scott and "Sarge". He described having four children, three by a Jane Luckenbach, and one by a Alverdo Panetti. He appeared to grasp the meaning of competency stating that he hoped that he was competent, so that the legal system would continue to move, as he described it, and therefore resolve his present circumstance. He denied feeling suicidal, but stated that if his hopelessness worsened he might

begin to have such feelings. He stated that he is being visited by a local Preacher of a Presbyterian Church and that these visits are a comfort to him. When questions about his estate were broached he described his family's dairy farm, his jeep and his saddle, his bed role and his blacksmithing tools. As mentioned, he writes poetry and is able, he states, to concentrate and complete his poems and to memorize them. He stated that his income is from a disability pension from social security for a mental disorder. He appeared to have good insight into the fact that his medication helped him from "twisting off" or getting psychiatrically sick, as he related: that he was afraid not to take the medications: that he appeared to know some usual side effects of the medication: and that alcohol worsened his overall mental state. He knew the names of two treating psychiatrists, Dr. Warner and Dr. Lennhoff, both of the VA system. When asked questions about judgement such as a fire in a crowded movie theater he responded appropriately, "it would throw widespread panic". When asked about a stamped letter near a mail box he stated that he would assume someone had dropped it, that they would want it mailed, and that he would therefore so mail it. He mentioned some allusions [sic] at times of seeing a glowing light. He also stated that at one time he saw Jesus in his cell and that, he does have, at times, auditory hallucinations of undescribed voices. He knew who is [sic] attorney was, knew him by name. He knew that the attorney had a creed of ethics, an oath, and knew that he was representing him in the present legal problems. He knew that the attorney practices law. He appeared to have insight into the different roles that an attorney plays, and he offhandedly joked that he did not know what his attorney would get out of such a situation as representing him on these present charges.

Mr. Panetti was seen twice on the same day. He was given some time in between the interviews to allow him to have a cigarette, relax and then certain questions were repeated to see his consistency and responses. He mentioned several times about some incidences where he was struck by lightning at the local Redstone Ranch. Where he was drowning when he fell in a pool. Where he was drowning while in the Navy. And while he was in a burn unit for electrocution while working for Central Texas Electric.

Mental Status Exam: General impressions: patient was seen at Fredericksburg jail with attorney present. Affect inappropriate, staring with a fixed stare seldom blinking his eyes. Mood concerned and apprehensive about the future. No gross disturbance of sleep. Thought; thought flow showed some looseness and tangentiality in thoughts. He denied significant depressive symptoms. No evidence of manic symptoms. He admitted to both visual and auditory hallucinations. He related chronic delusions. He appeared suspicious and paranoid. He denied present suicidal and homicidal thinking. His overall care of himself at this time appeared adequate. Orientation showed that he was oriented to his person, though he did ~~not~~ miscalculate his age by stating he was either 34 or 35; he was oriented to place. He was oriented to time in that he knew it was near Thanksgiving, that All Saints Day had just occurred, that it was the month of November but he said 1991; he appeared oriented to the circumstance of the examination. Under memory; his recent memory appeared intact; his recall memory basically appeared intact, he remembered two out three objects at five minutes, the object he missed was saying Roof rather than umbrella; his remote memory appeared intact. Calculations; he did serial 3 subtractions without significant mistakes. His intellectual function

appeared within the normal range. His cognition was distractable at times. His fund of knowledge was fair. His ability to abstract was quite concrete and personalized for proverb interpretation. His insight was fair to good. His reliability was open to question given the circumstances. His judgement for classic questions about fires in movies and mailing stamped letters was quite good and insightful. His cooperation overall was good.

Conclusion: Overall at this time this man appears to have chronic delusions, occasional hallucinations and an odd fragmentation of his personality in describing himself as several different people. He has a history of some traumatic injuries with possible near drownings, electrocutions and lighting strikes, but there does not appear to be substantial evidence of brain damage from these traumas. Despite his religiosity and his delusional thinking his overall story was quite consistent and insightful. He appeared to understand the charges against him, their significance, as well the significance of possible punishments that might result. He understood the circumstances as to why the charges were brought. He understood who his council was, appeared to relate with the council in a reasonable fashion despite his obvious mental difficulties. He appeared to understand his estate and his relationship with various people in his life. He appeared to be able to assist in his own defence and to process the information and questions given to him. He appeared to be able to retain the information from the first and second meetings and synthesized the information in a way that would allow him to expand on various issues. For these reasons, overall, he appears competent to stand trial.

Recommendations: At the time of this interview on 11-6-92 Mr. Scott Louis Panetti appears competent to stand trial.

Respectfully Submitted.
/s/ E. Lee Simes MD
E. Lee Simes, M.D.

ELS:kam

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SCOTT LOUIS PANETTI,	§	
Petitioner,	§	
	§	
V.	§	
	§	**CIVIL CASE**
WAYNE SCOTT, Director,	§	**NO. A-99-CA-260SS**
Texas Department of Criminal	§	
Justice, Institutional Division,	§	
	§	
Respondent.	§	

AFFIDAVIT OF SCOTT MONROE

BEFORE ME, the undersigned authority, personally appeared Scott Monroe, who being duly shown by me, deposed as follows:

"My Name is Scott Monroe. I am eighteen years or older, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am an Attorney licensed to practice in the State of Texas. My State Bar Number is 14272700. I have been licensed in Texas since June 1979. My office is located at 317 Earl Garrett, Kerrville, Texas 78028. My office telephone number is (830) 896-2715.

I was appointed as the stand by Counsel for Scott Panetti at his capital murder trial. I was in Court during the hearing on June 22, 1995, when Scott asked the Judge to represent himself and fire Preston Douglas and Richard Mosty. I was not appointed until the next hearing on July 20, 1995. Scott Panetti asked the Judge to fire me at a hearing on August 8, 1995. One day Scott said I was fired

and late that day, he told me he changed his mind and I was not fired. At the hearing Scott advised the Court that I had been overstepping my bounds as standby counsel by doing things that I was not appointed to do. He did this in the form of accusations, implying that I was behaving inappropriately. In fact, the one or, two times that I probably did technically overstep bounds by doing leg work that I should not do, I did at Scott's request. Scott even commented that he knew he was asking me to do things that I was not supposed to do but he could really use my help.

Judge Ables set conditions on my stand by representation. As stand by Counsel, I was to take no action or give any advice to Scott unless he specifically asked. I attach a copy of the restrictions imposed on me by Judge Ables. In the Courtroom, Scott did not want me to sit at the counsel table with him unless there was more than one attorney for the State at the counsel table. He did not want the jury to think that he was getting help on his case. I sat in the spectator seats during the trial.

I worked on the case from July 1995 until the conclusion of the trial in September 1995. I observed Scott outside the Courtroom at the Jail and during the entire trial. In my opinion, Scott was not competent to stand trial during the time I was the stand by Counsel. In my opinion, Scott was not competent to represent himself. Scott did not have a factual and a rational understanding of the capital murder proceedings. Scott was not able to assist me and I was not able to assist him due to his mental illness. Scott was paranoid of a big conspiracy that everyone was out to get him, He had to represent himself to prove insanity. Scott was not on any psychotropic medication during the trial. I talked to Scott to allow attorneys to

represent him. I literally begged him, but, it made no difference. I had his sisters and family try to talk to him to let the attorneys handle his case. He did not understand that he could not adequately represent himself.

Even though Judge Ables ordered me to take no action unless Scott specifically requested my help, I prepared information for him to prepare his capital murder case. I bought a Code of Criminal Procedure and Penal Code for Scott to have to read any law on his case. Scott did not want the Codes, he gave them back. I made a copy of an Overview of Capital Murder by Mark Stevens from a State Bar seminar for Scott. I made copies of all relevant sections of the Code of Criminal Procedure on voir dire of the capital venire, challenges for cause, pre-trial motions, evidence and punishment special issues. Scott did not use the information I prepared for him. I tried to outline the theory of the defense, but, Scott was only interested in his own show. I tried to discuss defense witnesses, but, Scott only wanted to visit with old friends, not prepare for trial. I tried to advise Scott areas not to ask about with State's witnesses, especially Sonya Alvarado, Scott was not able to use any advice I gave him. Nothing I told him made any difference. He did not understand the reasons for my advice and did not realize the effect of his decisions and actions.

At a meeting during jury selection, I advised Scott on several important issues on the confession, preservation of error, invoking the rule and general rules of voir dire. This was all way above Scott's head. It did not appear to make any sense to him. At a meeting on Scott's Motion to Disqualify Judge Ables, Scott would not tell me the reasons. We were in the jail interview room that Scott thought was bugged. He would not tell me the reasons since he did not

want the DA to know his reasons in advance. Scott still had a few motions pending that had not been ruled on. He never asked me about the procedure or how he needed to present the motion. He did not ask me whether or not he needed to call any witnesses or whether or not he needed to testify. He did not ask any questions about any procedural matters about how these motions were to be heard. He did not know that his venue motion and motion for out of state witnesses require testimony since he never asked. When I got an envelope from Scott, it was obvious that it was filled with the media information, video and affidavits for the venue motion. Scott mailed it to his sister with all the other information in his file. I confronted Scott that he need this information for his hearing and trial. Scott insisted on mailing the information to his sister. I tried to tell him it was a mistake but he just simply would not listen to me on this point.

I also advised Scott that he needed to redo his subpoenas and that he was going to have to justify each person he was trying to subpoena. I do not think that this registered with him but I had done everything I knew to tell him how to subpoena people and what the requirements were in order to be able to subpoena somebody to trial. Scott kept wanting to bring up his "illegal confession" and I had tried to advise him about the danger in admitting a crime when he has a possible appeal point on a confession. At times he seemed to understand the point but he was hell bent on bringing up the fact that his confession was taken illegally. I mentioned that he could get a jury issue on this but I do not believe that he understood me.

I went to see Scott one morning but he was gone. He had been taken to the VA Hospital. When I saw him in the

afternoon, he was handcuffed so obviously he had had some sort of problems at the jail. I had taken Scott information on (1) questionnaires of all jurors, (2) a juror counting sheet to keep track of strikes, (3) an outline of voir dire from the Steiner case, (4) a list of the defense witnesses under subpoena, (5) copies of military records he left in the Courtroom, (6) copies of voir dire information I had prepared which he left in the Courtroom and (7) the Texas Rules of Evidence. Scott was obviously very, very worked up as he had difficulty in maintaining his focus. Every time I tried to talk about voir dire or discuss any of the things that I brought him, he instantly changed the subject until eventually we ran out of time. He told me that he wanted to talk to me again and also indicated that he would "not say anything if I accidentally did more than I was supposed to", indicating that he wanted me to assist him more than what a standby counsel was normally supposed to do. We ended the session without discussing jury selection at all. I was not sure that we were ever going to have an opportunity to have a discussion on jury section [sic] as I could not keep Scott focused.

During one day of questioning jurors, Scott was not keeping up with the strikes. Scott was very tired that day. He said that he stayed up all night. Scott was not paying attention to the questions Bruce asked and responses from the potential jurors. Juror # 21 had problems with insanity. Scott was not paying attention and did not come back to question this juror. When we got to the twelfth juror, Scott had one strike left. The Judge had explained that the left over strikes would not be carried forward on the alternate jurors. Scott never asked me what the legal effect of not using all his strikes would be and did not

consult with me at all on this point. Scott simply took the twelfth juror without asking me a question.

In another jail meeting, Scott insisted on rehashing old stories and exposition of old events that he had told me numerous times. I could not get him to focus on the actual trial of the case other than for brief moments at a time. Scott did not ask any other questions about the trial or any other comments related to the trial. He spent the rest of his time explaining to me again the sequence of events and why he wanted to call certain people to the witness stand. I remember one good meeting with Scott. He was very focused and appeared to be taking his trial very seriously. When I saw him next, we had a very difficult meeting. Scott was upset on the Sheriff's refusal to allow an appointment with a psychiatrist on September 12, 1995. When I asked him to give me a little more information as to why he told me that his mind was too clouded from his illness and he was unable to concentrate. When I asked Scott whether or not he wanted to go ahead and talk about the trial he indicated that he was having too much difficulty staying focused and could not concentrate on anything for any length of time. He said he had even had some questions for me previously but he could not remember what they were.

On occasion, I tried to do more than the limitations of [sic] the Court imposed [sic] standby counsel, but, Scott's mental illness prevented me from helping him in any way. I knew that Scott was unable to ask the proper questions for me to give him advice under the Court's Order so I tried to go above and beyond the Order and suggest that he needed to ask me questions. He still failed to utilize me in any way. Nothing I did could help Scott. He never understood my attempts to help. I tried to do everything.

One time, in the back room, Scott wanted to pray. I was apprehensive about Scott, but, prayed with him holding onto my arm. It made me nervous, but, I wanted to do anything to reassure Scott that attorneys would help him. I know how the Jurors must have felt when he would approach them to hand them back their questionnaires. He had written on each questionnaire but insisted on giving back to each juror after questioning. It was scary when Scott walked up to you. Scott never understood the effect he had on other people. Scott never was able to understand what I was trying to do to help him.

I tried and tried to get Scott to map out his witnesses for his defense so he would plan the order and what he thought they would say. Scott, for some, reason, would not plan witnesses unless forced to by Judge Ables, then he would not call who was on the witness list. Carrie Whitt, with the District Clerk's Office, had made up lists of witnesses to follow in Court. It did no good.

Scott's incompetence affected his case. Bruce Curry, the DA, had put Scott's ex-wife, Sonya Alvarado on the stand on the first day of testimony. She was his first witness. It was her parents that Scott had killed. After Scott's bizarre questions and actions to [sic] Sonya, the Jury was ready to give him the death penalty. Scott angered the Jury by his demeanor and actions. I tried to advise Scott on the method of questioning his ex-wife, but, he did not listen. I told him not to go over the shooting and other details of the family that were not relevant. It did no good to advise Scott.

Scott was repeating questions. He was splitting hairs with the witnesses on the confession. Scott was calling witnesses that had nothing to do with insanity. Scott was

really upset over the release of Dr. Simes. Judge Ables had warned Scott that Dr. Simes would not be available and to call him since he was present. Scott said he did not understand what the Judge had told him and he was confused.

When Scott testified, it looked like he went into a trance. Scott is [sic] sitting in the witness chair with Ranger Cleat Buckelew between him and the Jury. Scott had his head down, not looking at the Jurors although he was seated directly by them. Scott recalled in his trance-like state, the details of the shooting, reciting what happened in the third person as a dialogue. Scott said "Sarge ran into the room. What was Sarge doing? Where is Birdie?". Scott was pointing his hand out across the jury box like he was shooting as he recited "Boom, Boom, Boom", Scott's head was down as he spoke while he pointed at the jury with the booms. He could not see the reaction of the Jury. The Jury was visibly upset by the pointing demonstration. I had seen the jurors who were sitting closest to Scott, move away when he sat down. Now he was blindly pointing at the panel while he spoke of "Sarge shooting Joe and Amanda Alvarado". This was a show of a mentally incompetent man and did more to give him the death penalty than any other event in trial.

This was not a case for the death penalty. Scott's life history and long term mental problems made an excellent case for mitigating evidence. Scott did not present any mitigating evidence because be could not understand the proceeding. He obviously thought that this courtroom "show" would be enough. Although many friends and family were available to testify, Scott only called me at punishment to rebut a statement that Dep. Gideon made about Scott. I tried to make Scott realize what mitigation meant. I do not think that he understood the concept or

how to present evidence or argue for mitigation in his own case. In my opinion, there was much to present, but, he was mentally incapable of showing the evidence,

On many occasions, Scott told the Judge he needed to talk to me about the case. Judge Ables would grant a recess and Scott and I would go to the back courtroom to talk, Scott called it a "Pow-Wow". I knew how long the "Pow-Wow" was going to be by the size and length of the cigar he had to smoke. Scott was allowed to smoke during the recess in the back courtroom. Scott never talked about the case. He talked about something he wanted that was completely irrelevant. At times, Scott would have a basic conversation and other times when it was paranoid delusions. The Court gave Scott breaks every day and I would try to discuss his case to answer his questions or offer help. I was not able to give Scott any assistance because he was not mentally able to focus on his case. We never discussed anything relevant to his case at the breaks.

One day, Scott looked particularly bad. He told me that he could not sleep and had stayed up all night thinking about John Wesley Hardin. He had heard that Hardin was to be reburied. He even told the Judge about the reburial. That day he basically slept in Court. He would have his eyes closed and put his chin down. The Judge would say something when he would put his head down. It would take him a second to say something, like he had been asleep.

Scott dressed in a "Tom Mix" style costume like an old TV western. Scott wore his hat in Court. He had pants that looked like leather suede tucked into his cowboy boots. He wore a cowboy style shirt with a bandana. The shirt was the double fold over type western shirt. One

shirt was a green color, the other was burgundy. Scott wore a big cowboy hat that hung on a string over his back, It was a joke. It was like out of a dime store novel. Scott constantly used an old west vernacular in his speech. He used words like "bronc steer", "run away mule" and "shoe the bosses' hosses".

Prior to the trial, Scott was mailing all of his files to his sister in Chicago or his family in Wisconsin. Scott thought that the Jail guards were going through his files. Scott had received a duplicate of the file from Preston and Richard. I told him that over 75% of the materials had come from the DA and the guards would not go through his legal files. He would not listen. He thought that there was a big conspiracy out to get him. I had to get him the envelopes and get the mail out. My secretary and I sent a lot of mail for Scott. I kept a record of the expenses. Scott wrote all over the envelopes until they were covered with bizarre drawings and religious quotations. Eventually, there was so much going out that the judge told me to not send anymore. Judge Ables asked me why there was so much expense for mail and I told him what I was sending for Scott. When the trial began, Scott did not have his files. The material that had been prepared was not available. Scott's family brought the files back to Texas, but, Scott never used the materials. I do not think that Scott had a rational understanding of the importance of the information. I attach copies of the envelopes that Scott wrote on to the Affidavit.

Scott would call the office frequently wanting me or my secretary to come to see him for some reason. Scott would not say the reason for the visit. If I was able to visit with Scott, he never told why he needed the conference. He would go on about something, but, not his case. If I had

some information or advise [sic] for him, he was unable to respond. If I was gone, Scott would call my Secretary, Dee, so frequently that we would have to put the phone on the answering service.

Scott was filing Motions and Subpoenas with his rambling statements and bizarre artwork. I have copies of the 200 plus subpoenas he filed. Scott wanted to subpoena Jesus Christ, JFK, actors, actresses, and people who had died. I attach copies to this Affidavit. I have copies of the Motions he filed. I attach copies to this Affidavit.

Scott had prepared a special book of his poetry and artwork entitled "Bronco Gental Tamen Poet Ranahans Ranch Savy". The book contains the bizarre artwork and religious symbols that Scott used on other material. I attach a copy of the poetry book I received. Scott wrote on mine "Eloquent? Thou Dark my Path. And Sad My Lot Let me Be still and murmor not But Breath the Pray divinely Taught Thy will Be Done". He had given it to me as a "Fisher of Men" with the Christian symbol of the fish on both sides. This poetry book was very important to Scott. The capital murder trial was not.

After the trial, I spoke with a couple of jurors who told me that Scott probably would not have received the death penalty if the case had been handled differently. I spoke with Debbie Flores and Allen Duncan. In short, the jury was grossly "over-exposed" to Scott. Since Scott presented no real evidence of insanity other than his own behavior, the jury had no trouble with a guilty verdict. Unfortunately, they were also scared to death of Scott and they were fearful that somehow, someway, Scott might get out of prison. They gave him the death penalty to avoid this possibility.

Scott was not able to represent himself due to his mental incompetence. His bizarre actions and words affected witnesses and the Jury. Scott was not able to rationally understand his death penalty trial. I believe that his incompetence brought him the death penalty. In simple terms, by representing himself he hung himself. Scott's incompetence prevented him from asking for or using my assistance as his standby. I was not able to assist Scott in any meaningful way because he was so mentally incompetent. As a result, his trial was truly a judicial farce, and a mockery of self-representation. It should have never been allowed to happen, or, at least, stopped.

The above is true and correct".

/s/ Scott Monroe
SCOTT MONROE

SWORN TO AND SUBSCRIBED before me on this 26th day of July, 1999.

[LOGO]

ELIZABETH
DEBRESE BOHNERT
Notary Public,
State of Texas
My Commission Expires
June 22, 2001

/s/ Elizabeth DeBrese Bohnert
Notary Public
State of _____

My commission expires: _____

INSTRUCTIONS REGARDING STANDBY COUNSEL

1. Unless otherwise requested by the Defendant, standby counsel is to be seen and not heard.

2. Standby counsel is not to sit at the counsel table with Defendant unless Defendant asks him to do so.

3. Standby counsel, when requested by the Defendant, may advise Defendant on *procedural matters only*. Standby counsel shall not, at any time, advise Defendant on any substantive matters, even if requested to do so by the Defendant.

4. Standby counsel may not participate in *any* part of the trial process unless specifically requested to do so by the Defendant, and, then only on procedural matters by way of giving advice to the Defendant.

5. Standby counsel shall not question any prospective jurors nor make any suggestions or offer advice as to which prospective jurors might be favorable to the Defendant or Prosecution.

6. Standby counsel shall not exercise any preemptory challenges or challenges for cause on any prospective jurors.

7. Standby counsel shall not advise Defendant as to any particular areas of inquiry during voir dire.

8. Standby counsel shall not make any objections unless requested to do so by the Defendant.

9. Standby counsel shall not make any motions for mistrial unless requested to do so by the Defendant.

10. Standby counsel shall not advise Defendant of any procedural irregularities, either by the state or by the Defendant, unless requested to do so by the Defendant.

11. Standby counsel shall *not* volunteer any procedural assistance to Defendant.

12. Standby counsel shall not do any other act or take any other action, which in the opinion of either standby counsel or the Defendant, would in any way interfere with or affect the right of the Defendant to represent himself.

REQUEST FOR PROCEDURAL ASSISTANCE FROM STANDBY COUNSEL

I, SCOTT LOUIS PANETTI, do hereby request procedural assistance from my standby counsel, SCOTT F. MONROE, on the matter of or with respect to the following:

_____

_____

_____

Date: _____ /s/ _____
SCOTT LOUIS PANETTI

_____

NO. 72,230

EX PARTE **IN THE COURT**

OF CRIMINAL APPEALS

SCOTT LOUIS PANETTI **OF TEXAS**

AFFIDAVIT

Before the undersigned authority, personally appeared Wolfgang Selck, who being duly sworn by me, deposed as follows:

My name is Wolfgang Selck. I am eighteen years or older, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am presently retired. I was physician licensed to practice in the State of Minnesota and New Mexico. I graduated from medical school in 1951. I practiced medicine in Minnesota from 1955 to 1958. I worked at a Minnesota State Hospital from 1958 until 1960. I attended the University of New Mexico where I studied Psychiatry. I was on the staff at the Department of Psychiatry at the University for 3 years from 1966 to 1969. I was in private practice in New Mexico for 10 years from 1969 to 1979. I worked at the Starlite Hospital as a psycho-therapist for 12 years from 1981 to 1993.

I treated Scott Panetti at the Starlite Village Hospital for mental illness. I diagnosed Scott as suffering from Schizophrenia, undifferentiated chronic with acute exacerbation and with a borderline personality disorder as a secondary diagnosis in April 1986. In my opinion Scott was mentally ill with a condition of schizophrenia. Scott also suffered from psychotic episodes. Some

of his symptoms of schizophrenia included bizarre behavior, verbigeration which is the repetition of words, fixation on details and hallucinations. A schizophrenic cannot grasp the actual reality and loses the overall picture of the actual reality. Stress can increase the mental illness and cause an inability to function. The use of alcohol and drugs by Scott was in part a form of self medication because he felt the effects of the mental illness. Due to the long term effect of alcohol and drugs Scott most likely developed more and more paranoid ideation and at the time of the trial appeared to be suffering from paranoid schizophrenia When I observed Scott in the hospital in 1986, it was my opinion that he was unable to function in any form or fashion at that point. It was my opinion that Scott was incompetent. Because a person with paranoia is not likely to change, it was my opinion that Scott was in all probability not sane at the time of the offense in 1992 and was definitely not competent to stand trial in 1995, because I observed him for 1 and 1/12 [sic] days. I doubt that he did know right from wrong and most likely could not act any other way he did act due to his illness.

I was never contacted by the attorneys Mr. Preston Douglas nor Mr. Richard Mosty during 1992 until 1995. Since I had treated Scott after a prior psychotic break that required his hospitalization, I had information on his state of mind. I was willing and able to be interviewed and to testify at the competency hearings or the trial. In all probability Scott was severely mentally ill, insane and not competent.

I received a subpoena to appear for the Capital Murder trial in Kerrville, Texas, in September 1995. Scott did not contact me to discuss the

medical records on him, my diagnosis or opinions on him. When I came to Court on the subpoena, I did not know what questions I would be asked or information I would need to know. I told Scott that I did not have the medical records from the hospital and did not remember the specifics of his case. It a had been nine (9) years since I had treated Scott. Scott handed me in the Courtroom a summary of the medical records. Scott did not tell me what he would ask me about. Scott also insisted that I watch the testimony of witnesses. I appeared in Court on Tuesday, September 20, 1995, and sat in the Courtroom all day since Scott insisted that this was important. I was not called to testify until the next day on Wednesday, September 21, 1995. Scott never told me the reason to be present during testimony and I never saw the reason. The request is one of the inappropriate behaviors I witnessed Scott do.

The District Attorney, Bruce Curry, took the time to question me on what opinions I had. I told him that I did not know what Scott would ask me. I told Mr. Curry that I had not examined Scott since 1986 and did not the details of the shooting that lead to the charges. It was obvious to me during the questions that Mr. Curry asked that he had the advantage to cross-examine me since Scott had not told me the subjects of the testimony or what data I needed to know for my opinions. Because Scott was not capable of preparing to defend himself and rationally present my testimony, the District Attorney was given an advantage that he used before the jury.

I had the opportunity to observe Scott for an entire day while he called witnesses. I had the opportunity to see Scott testify to the Jury in a narrative fashion. In my opinion, Scott was not

competent to stand trial because he was unable to assist himself in his own defense and he did not have a factual and rational understanding of the proceeding. I base this opinion on my prior treatment of Scott and on two days of observation of his during the Capital Murder trial. I was able to observe him ask questions of witnesses, give testimony himself, argue with the District attorney and the Judge and see his physical and verbal actions. There is no doubt in my mind that he was mentally ill and that he was incompetent to stand trial.

I witnessed a number of incidents where the inappropriate use of language and actions show that Scott was mentally ill and incompetent. Scott literally enjoyed the spectacle of the Courtroom where he was the center of attention, Scott enjoyed the trial since he was getting attention and was being allowed to act like an attorney, Scott acted like a prima donna. I recognized this behavior as inappropriate since mentally ill persons act out inappropriately. The paranoid person is often acting the role of a prima donna completely ignoring the reality of the situation to make him feel important. The mentally ill and paranoid person feels inferior and will act the role to get attention. Scott wanted to show off and by being allowed to represent himself he had center stage. Scott was acting out a role of an attorney as a facet of the mental illness, not a rational decision to represent himself at trial. One facet of Scott's schizophrenia were the personalities of Ranahan and Sarge Ironhorse. The thought process of the schizophrenic is so frustrated that the person actually thinks someone else does the act they assume multiple personalities. In the Courtroom, Scott was allowed to act

the role of an attorney even though he was not and was not capable of helping himself. The fact that he insisted on defending himself in my opinion, is the best practical demonstration of his mental illness and incompetencies.

Scott was acting as his own attorney from his paranoid fear that the attorneys were out to get him. Due to the paranoia, Scott was lead by his mental illness to demand to represent himself. Since Scott could not trust lawyers to represent him, he had to represent himself. This decision was a facet of his paranoia and severe mental illness.

The testimony of Scott and his jury argument clearly showed to me that he was mentally ill. It was so obvious to me because the inappropriate behavior is a clear sign of mental illness. Scott was inappropriate in his testimony and argument because he was not relevant and did not prove any relevant point. Scott gave a rambling presentation that showed he could not think clearly nor understand what information was important in his trial The rambling nature of his talk shows a break down in his thought processes. Verbal rambling is a sign of mental illness.

As a psychiatrist I also observe the emotion rather than the contents of the sentence. The emotion that Scott displayed was also a clear sign of mental illness and incompetence. To the lay person and the jury, it may have appeared that Scott was capable because he appeared normal in the sense that he could talk in sentences ask questions and argue. One reason that some mental illness is difficult to determine is because paranoid people are unusually sharp in certain areas. A paranoid schizophrenic may be

alert to time and place, but, this has to be contrasted with the verbal rambling where the person is lost in irrelevant talk or where the person has fixed ideas. In my opinion Scott was so inappropriate that the only conclusion is mental illness and incompetence.

There were other incidents of inappropriate behavior that indicate incompetence. Scott was very loud in his talk and walked around the Courtroom in an inappropriate manner. It is not my opinion that Scott posed a physical danger, but, his words and acts were out of place and inappropriate. There were a number of times where Scott was acting as the prima donna and the judge tried to stop him. Scott would argue with the Judge and the Jury would be excused. After the Jury's return, Scott continued his irrelevant and inappropriate rambling. A particular problem for mentally ill people is the repetition of words. The phenomena is called verbigeration and shows an inability to function. Scott would repeat certain words that had no relevance.

In my opinion Scott's mental illness had an effect on the Jury that was visible. It was obvious from the appearance of the Jury that Scott antagonized them by his verbal rambling and antics. Scott was completely unaware of the effect of his words and actions. I observed in the Jury a complete negative reaction to Scott. Members of the Jury had hostile stares and looked at Scott in disbelief while he rambled and made no sense. The Jury seemed to see Scott as putting on a show. Scott was unable to see the totally negative impact of his mental illness on the Jury. I saw Scott's rambling and antics as a sign of his clear incompetence. I suspect that the members of the

Jury as lay persons saw Scott and thought he was normal and pretending to be mentally ill. In my opinion it is not possible to imitate the words and actions of a mentally ill person. To an experts there are too many details of voice and action that indicate the signs of mental illness: the inappropriate behavior, the repetition of words, the fixation on details, the bizarre presentation. He should be institutionalized in a State Hospital for the criminally insane. In my opinion, Scott is not a malingerer. Scott was not faking a mental illness. Scott was severely mentally ill and has not changed and most likely shall not improve to an appreciable degree. When I was treating Scott in 1986 he was not facing any charges and had no reason to act mentally ill. He was hospitalized several times in 1986 because he had complete breaks from reality and was suffering severe mental illness. When I observed Scott in 1995 it was obvious that his mental illness was preventing him from representing himself and adversely affecting the Jury deciding his case.

The trial gave Scott the opportunity to get the attention that a paranoid person so desperately needs. Scott needed to represent himself out of the delusion that he alone could defend himself. Scott wanted recognition as an attorney and got the Judge to allow him center stage. In Court, Scott did not perform as an attorney should before the Jury. Scott could not perform properly because of the mental illness. The mental illness caused Scott to fail to recognize the importance of the Jury. In his mind the Jury was not important. What was important to Scott was the recognition of the Judge, the District Attorney, witnesses and the public that Scott was an

attorney in the Courtroom. By being his own attorney he would be allowed to speak directly with witnesses, the Judge and the District Attorney. By being his own attorney, he would be allowed to be as important as the attorneys in the Courtroom, the Judge and the District Attorney. It was more important to Scott to act like he was an equal regardless of the consequences of his actions. Scott failed to understand that the Jury was deciding his fate and that his words and actions would affect their verdict. Scott was completely satisfied that he was the center of attention of the Judge, the District Attorney and the witnesses and public in the Courtroom. What Scott completely failed to understand was that he needed an attorney to perform the role of his advocate for his case. What Scott wanted was to take over the Courtroom and do what he pleased and say what he wanted. The Jury was irrelevant to Scott. The Jury's decision was irrelevant to Scott. The argument he made that the Judge may have helped to receive the guilty verdict by the jury by allowing him to say and act as he wanted in Court.

The Courtroom was full of witnesses. When a witness was called he or she would get up from the public seats in the Courtroom and go to the witness stand. The witnesses who were called to testify had heard the prior testimony. I sat in the Courtroom for a full day and about a half day. The Courtroom was also full of law enforcement. I do not remember the exact number of personnel, but, I do recall that there were a number of deputies. I also recall that there were men on both sides of Scott at all times. There were other uniformed deputies in the area within the bar in the Courtroom. There were also uniformed

deputies located throughout the entire Courtroom. The law enforcement personnel could be seen using sign language to communicate with each other during the trial. I did not see any reason for additional security since Scott was mentally ill. I did not see any behavior that indicated that Scott was going to physically act out or be violent. I did see and hear Scott get loud and belligerent, but, this is typical inappropriate behavior for an incompetent person.

I was called as a witness by Scott at his Capital Murder trial in Kerrville, Texas. I was able to observe Scott in Court since the witnesses were allowed to sit in the Courtroom prior to their testimony. I was able to observe Scott while he questioned witnesses and myself and the content of his questions. I was able to observe Scott while he talked to the Judge or the District Attorney. In my opinion Scott was not competent at his trial. There is no question in my mind that Scott was incompetent at his trial. I base my opinion on my prior observations of Scott and what I saw in the Courtroom. Scott's questions and conduct were bizarre and reflected a break from reality.

/s/ Wolfgang Selck
WOLFGANG SELCK

SWORN TO AND SUBSCRIBED before me on this the 9th day of June, 1997.

/s/ Chris Wallendorf
Notary Public
State of Texas
My Commission Expires: 10/22/2000

CAUSE NO. 6008

IN THE MATTER OF THE MARRIAGE OF	§	**IN THE DISTRICT COURT**
JANE IRENE PANETTI AND SCOTT LOUIS PANETTI	§	**216TH JUDICIAL DISTRICT**
AND IN THE INTEREST OF CHASE LOUIS PANETTI, KATRINA JANE PANETTI and MARY ROSE PANETTI, Children	§	**GILLESPIE COUNTY, TEXAS**

PETITIONER'S SUPPORTING AFFIDAVIT FOR EXTRAORDINARY RELIEF

THE STATE OF TEXAS §

COUNTY OF GILLESPIE §

BEFORE ME, the undersigned authority, on this day personally appeared JANE IRENE PANETTI, who, being by me duly sworn on oath stated:

> "My name is JANE IRENE PANETTI. I am the Petitioner in the above styled and numbered cause. I am of sound mind and am capable of making this Affidavit. I have personal knowledge of the facts stated herein."
>
> "My husband, SCOTT LOUIS PANETTI, has over the last two months been experiencing hallucinations and has been generally out of touch with reality. He became very paranoid and was always thinking that someone was watching him from the creek in our backyard. He would sit on the porch all day to keep watch. The paranoia has continued to present. After our baby was

born in March, he became obsessed with the idea that the devil was in our house. He finally had a ceremony to get rid of the devil during what he called the 'devil's birthday'. He buried many valuables next to the house and stacked other furnishings and valuables above the ground which he washed with water. He would stay up during the night and 'make magic with the lights'. He claims that he saw the devil on a wall and cut the devil with a knife and that blood had run out on him."

"On another occasion he called up Wilbert-Hopf Vault Company where he once worked and accused them of having an employee who had torn up the road in front of our house. That had not happened, he was just imagining it. He argued with his ex-employer and told him to come over and have it out with guns and knives."

"Over the past two months he has been in and out of the State Hospital in Kerrville, Outreach Center and Starlight at Centerpoint. When he was at Centerpoint, he kept leaving on his own. On one occasion when he came home and when he knew I would not be pleased with his leaving Starlight, he put on a camouflaged jacket and stood outside and told me that if I really wanted to know what Apocalypse Now was really like to just try something."

"This past week, it was recommended that he be transferred to the V.A. Medical Center in Waco, Texas, and I arranged for the Kerr County Emergency Medical Service to take care of the travel arrangements as I feared he might try something if I attempted to transport him. Attached hereto is a copy of the health insurance claim form that was given me by the Emergency

Medical Service. My husband's diagnosis is described as 'chronic undifferentiated schizophrenic'. In the past he has phsyically struck me and caused bodily harm to me."

"My husband called me last night and told me that he was fine and was going to leave the hospital. I encouraged him to stay because he needs help. In his paranoid state, I am sure that he now sees me as a threat and fear that he may harm me, the children, or try to destroy our property."

Signed this 16th day of May, 1986.

/s/ Jane Irene Panetti
JANE IRENE PANETTI,
Petitioner

SWORN TO AND ACKNOWLEDGED BEFORE ME this 16th day of May, 1986, by JANE IRENE PANETTI.

/s/ LaVerne Houy
Notary Public,
State of Texas
My Commission Expires:
5/23/88
LaVerne Houy
(Typed or Printed Name)

AFFIDAVIT

STATE OF TEXAS §
§
COUNTY OF BEXAR §

Before me, the undersigned authority, on this day personally appeared John Wilson Rowland, known to me to be the person whose name is subscribed below, who being duly sworn by me, deposed as follows:

"My name is John Wilson Rowland. I am eighteen years or older, of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated.

I have been engaged in the practice of law for sixteen (16) years in the State of Texas since November 4, 1983. Currently, I am also licensed to practice law in the Western District of Texas, the Fifth Circuit Court of Appeals in New Orleans, Louisiana, and the Supreme Court of the United States of America. I am Board Certified in Criminal Law by the Texas Board of Legal Specialization. My Law Office is located at 131 Idlewilde, Comfort, Texas 78013. My telephone number is (830) 995-4371.

I represented Scott Louis Panetti in the state habeas proceedings. I have meet [sic] with Mr. Panetti on numerous occasions during the three (3) years since my appointment in 1996. In my opinion, Mr. Panetti is not competent because he does not have a factual or rational understanding of the proceedings. Mr. Panetti suffers from severe mental illness, Schizoaffective Disorder, which prevents him from rationally understanding and communicating about his case. Schizoaffective Disorder is a combination of schizophrenia and manic depression, a bipolar condition. Mr. Panetti is unable to have a rational

conversation because he has loose associations in his thought process, that is his communication is not coherently connected together. He has flights of ideas where he suddenly changes his thought process and goes off on incoherent or illogical ideas. Mr. Panetti suffers from delusions, hallucinations and recounts bizarre stories which show that he does not have a factual understanding of his circumstances. Due to his severe mental illness he was not able to assist this counsel during the state habeas proceedings.

I recently met with Mr. Panetti on June 7, 1999, with co-counsel, Michael C. Gross. Mr. Panetti continues to be incompetent. I attempted to explain that Mr. Gross and I had been appointed in his federal habeas corpus case, but, he was unable to respond to what I said. Instead, Mr. Panetti spoke at length about irrelevant subjects (looseness of associations); including his spiritual healing powers, his desire to reconsecrate his Nazerine vows, and his grandiose self concept as a Messiah. Mr. Panetti's speech was rapid, non-sequential, irrelevant and irrational (flight of ideas). Mr. Panetti continues to have hallucinations and suffer from delusions; he described the torture chamber used at Death Row which he claims is below the prison and referred to a torture chamber at Jester IV, a psychiatric unit where he has been examined by TDCJ staff. He is very egocentric, with grandiose delusions, talking at length about his healing powers and role as a Messiah. Mr. Panetti's appearance was not appropriate; his eye contact was often an intense stare, he laughed at jokes only he understood and he often had a smile that was not appropriate to the conversation. He also suffered from perceptual disturbances which he called the "voice of the spirit."

I had prepared an outline of topics to discuss with Mr. Panetti. Mr. Panetti was unable to respond to a single topic. This inability to rationally discuss his case, caused by his thought disorder, is consistent with all my prior visits with him. When I attempted to mention a topic, he was unable to continue the same line of thought in his conversation, instead going off on some bizarre tangent. He would talk about the Death Row guards and the "belly of the whale" or his spiritual healing and role as God's son. During the entire conversation, Mr. Panetti constantly held up for our inspection a small pocket bible. The cover of his copy was filed [sic] with scribbles and art. Mr. Panetti was often making esoteric references to the Bible and would hold up his copy to show us some important significance that only he saw. To answer a question from counsel, he would open his Bible to read a verse that signified to him the answer. Among his many bizarre statements, Mr. Panetti said that he alone at Death Row was a "closet commando Guru" and that "he who is first is last." It was impossible to have a rational conversation with Mr. Panetti about his case.

When I told Mr. Panetti the interview was finished, he stated that he was ready to respond to our questions. I had gone over the list of topics and was unable to get a single specific rational response. At the conclusion of the interview, Mr. Panetti was unaware of his situation and did not appreciate that he was not able to rationally respond about his case. My last remarks were about the next steps in the case. Mr. Panetti last response was typically irrelevant and irrational. Mr. Panetti finished the interview telling us that "Jesus is here" and the "Lord knew everything today."

I continue with the opinion that Mr. Panetti is not competent. It is my opinion that he does not have a factual understanding, nor a rational understanding of the proceedings against him. Mr. Panetti's thought disorder prevents him from assisting his counsel in his defense.

I have prepared and read this statement it is true and correct.

/s/ John Wilson Rowland
JOHN WILSON ROWLAND

SWORN TO AND SUBSCRIBED before me on this the 23 day of June, 1999.

[LOGO] LORI FLORES MY COMMISSION EXPIRES September 16, 2002

/s/ Lori Flores
Notary Public
State of Texas

CAUSE NO. 3310

THE STATE OF TEXAS	§	**IN THE DISTRICT**
	§	**COURT OF GILLESPIE**
V.	§	**COUNTY, TEXAS**
SCOTT LOUIS PANETTI	§	
	§	**216TH JUDICIAL DISTRICT**

DEFENDANTS MOTION FOR APPOINTMENT OF COUNSEL TO ASSIST HIM IN ARTICLE 46.05 PROCEEDINGS

(Filed February 19, 2004)

Defendant Scott Louis Panetti asks this Court to appoint and reasonably compensate undersigned counsel to assist him in the proceedings to determine whether he is competent to be executed. *Ford v. Wainwright,* 477 U.S. 399 (1986), relying on the Eighth and Fourteenth Amendments, assumes that an inmate who makes a substantial threshold showing of incompetence will be represented by counsel during the competency determination proceedings. Mr. Panetti clearly made such a threshold showing in his last Article 46.05 motion. Accordingly, this Court must appoint counsel to represent him for the remainder of the *Ford* proceedings.

Although the Texas Legislature codified the process for determining whether a death row inmate is competent to be executed, critical issues remain unresolved regarding the procedures to ensure protection of an inmate's Eighth and Fourteenth Amendment rights. *Ex parte Caldwell,* 58 S.W3d 127 (Tex. Crim. App. 2000), the only case from the Court of Criminal Appeals reviewing Article 46.05, makes it clear that the trial court has the discretion to appoint counsel "in any given case." *Id.* at 130. *Caldwell* specifically

addressed whether the statute required the appointment of counsel to ***prepare*** the motion and assist the inmate in meeting the incompetency threshold. The Court of Criminal Appeals held that: "There is no provision in article 46.04[1] for the appointment of counsel for ***preparation*** of a motion to determine competency. Although a trial court could appoint counsel in any given case, the trial court does not abuse its discretion by failing to do so in this context." *Id.* at 130 (emphasis added).

Unlike Jeffrey Caldwell, Mr. Panetti is not seeking appointment of counsel to assist him in preparing a competency motion. Undersigned counsel already performed that service pro bono. Although Article 46.05 does not expressly provide for the appointment of counsel for those inmates, like Mr. Panetti, who have made "a substantial showing of incompetency," *Caldwell* implies that failure to do so would be an abuse of the trial court's discretion. *Id.* at 130.[2] More important, however, failure to appoint counsel after the inmate has made a substantial threshold showing of incompetency would violate the minimum due process requirements set out in *Ford*. Where constitutionally required procedures are not forbidden by statute – but are also not expressly permitted – the courts must temporarily provide a remedy until the

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[1] Article 46.04 was renumbered Article 46.05 in the Texas Code of Criminal Procedure, effective September 1, 2001. Acts 2001, 77th Leg., ch. 1420, §1.001(13).

[2] According to the ABA, "the prospect of an incompetent defendant litigating his or her own competence pro se does not afford sufficient assurance of a fair adjudication." ABA Criminal Justice Mental Health Standards §7-5.7 comment at 298 (1989). "[T]he risk of erroneous determination when the inmate is not represented is very high, and the likelihood that counsel will reduce the risk of error is substantial." *Id.*

legislature establishes a constitutionally sufficient procedure. *See, e.g., Id.* at 131 (Johnson, J., dissenting) ("The absence of a provision in article 46.04 which explicitly deals with the appointment of counsel should not be read as negation of the constitutional right to counsel at critical stages of a criminal prosecution. Silence is not negation.").

Although *Ford v. Wainwright,* 477 U.S. 399 (1986), is more commonly cited for the proposition that the Eighth Amendment prohibits the execution of the insane, seven Justices of the Court also expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. Although the seven Justices, in three separate opinions, could not agree on the minimum level of procedural due process required by the Constitution, all seven assumed that the death row inmate would have the assistance of counsel during the competency determination. *See Id.* at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) (noting that "any procedure that precludes the prisoner ***or his counsel*** from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate") (emphasis added); *id.* at 427 (Powell, J., concurring in part and concurring in the judgment)) ("The State should provide an impartial officer or board ***that can receive evidence and argument from the prisoner's counsel,*** including expert psychiatric evidence that may differ from the State's own psychiatric examination.") (emphasis added); *id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part, joined by White, J.) (finding Florida's competency procedures inadequate because "***counsel for the inmate***" was not permitted to participate in the examination of the medical experts in

any adversarial manner) (emphasis added). Clearly, *Ford* demands, through the Eighth and Fourteenth Amendments, that a death row inmate who has made a substantial threshold showing of incompetency be assisted by counsel throughout the remainder of the competency proceedings.

CONCLUSION

Pro bono counsel made a substantial threshold showing of Mr. Panetti's incompetency in the Article 46.05 motion filed on February 4, 2004. Once this threshold has been met, *Ford,* in conjunction with the Eighth and Fourteenth Amendments, requires the appointment of counsel for the competency determination. Nothing in Article 46.05 or *Caldwell* prohibits appointment of counsel at this stage of the proceedings. Accordingly, this Court should now appoint undersigned counsel and reasonably compensate him nunc pro tunc to February 4, 2004.

Respectfully submitted,

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CAUSE NO. 3310

THE STATE OF TEXAS	§	**IN THE DISTRICT**
	§	**COURT OF GILLESPIE**
V.	§	**COUNTY, TEXAS**
SCOTT LOUIS PANETTI	§	**216TH JUDICIAL**
	§	**DISTRICT**
	§	

MOTION TO ENSURE THAT THE ARTICLE 46.05 "FINAL COMPETENCY HEARING" COMPORTS WITH THE PROCEDURAL DUE PROCESS REQUIREMENTS OF FORD

(Filed February 19, 2004)

Counsel for Defendant Scott Louis Panetti asks this Court to ensure that the Article 46.05 "final competency hearing" comports with *Ford v. Wainwright*, 477 U.S. 399 (1986), and the Eighth and Fourteenth Amendments. Although Justice Powell recognized in *Ford* that death-sentenced inmates do not enjoy the full panoply of trial rights in proceedings to determine their competency to be executed, a majority of the *Ford* Court did conclude that the hearing must retain some adversarial aspects, including the right to participate through appointed counsel, the right to present expert opinion differing from those offered by State or court-appointed experts, the right to explain the inadequacies of other competency evaluations, the right to discover the bases of any unfavorable expert reports, and the right to present argument. Accordingly, the "final competency hearing" required by Article 46.05 (k) must encompass these basic due process requirements.

The plain language of Article 46.05 requires the trial court to hold a "final competency hearing" before it makes its determination of the inmate's competency to be executed.

See TEX. CODE. CRIM. PROC. art. 46.05(k) ("If, on the basis of any reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, ***and any evidence introduced in the final competency hearing***, ... ") (emphasis added). This "final competency hearing" must meet the due process guarantees enumerated in *Ford*. Seven Justices in *Ford* expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. At the time, Florida law directed the Governor to stay the execution of a potentially insane inmate under a death sentence and appoint a commission of three psychiatrists to examine the inmate. *Id.* at 412. After receiving the commission's report, the Governor then made the determination whether the inmate was competent to be executed. *Id.* If the Governor concluded that the inmate was competent, he issued a death warrant. *Id.* at 413. In addition, the Governor specifically stated that the parties' attorneys should not participate in the competency determination in any adversarial manner. *Id.*

Although the seven Justices, in three separate opinions, could not agree on the minimum level of process required by the Constitution, all were troubled by the procedural inadequacies of Florida's competency determination. Justice Marshall, joined by three other members of the Court, found the Florida procedure constitutionally inadequate, because it precluded the condemned inmate or his counsel from presenting relevant information to the factfinder or participating in the competency determination in any adversarial manner. *Id.* at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) Recognizing that the probability of making a reliable decision increases when the factfinder can consider differing

psychiatric opinions, Justice Marshall concluded that "without any adversarial assistance from the prisoner's representative – especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission – the fact-finder loses the substantial benefit of potentially probative information." *Id.*

Justice Marshall noted that a related defect in the Florida procedure stemmed from the prisoner's inability to challenge, clarify, or impeach the findings of the state-appointed psychiatrists through cross examination or a less formal method. *Id.* at 415. He emphasized the important role that questioning the experts serves, because it:

> would contribute markedly to the process of seeking truth in sanity disputes by bringing to light the bases for each expert's beliefs, the precise factors underlying those beliefs, any history of error or caprice of the examiner, any personal bias with respect to the issue of capital punishment, the expert's degree of certainty about his or her own conclusions, and the precise meaning of ambiguous words used in the report. Without some questioning of the experts, concerning their technical conclusions, a factfinder simply cannot be expected to evaluate the various opinions, particularly when they are themselves inconsistent.

Id. (citation omitted). In sum, Justice Marshall, along with three other members of the Court, concluded that the "adversary presentation of relevant information must be as unrestricted as possible." *Id.*

In a separate concurring opinion, Justice Powell noted that the Florida procedures for determining competency did not comport with the fundamental fairness that is "the

hallmark of the procedural protections afforded by the Due Process Clause." *Id.* at 424 (Powell, J., concurring in part and concurring in the judgment). Focusing on the fundamental requisite of due process – the opportunity to be heard – Justice Powell concluded that the Florida procedures did not afford the petitioner that opportunity. *Id.* Because the Florida statute did not require the Governor to review materials that the prisoner submitted, Justice Powell concluded that:

> [T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

Id. Although Justice Powell refused to define the exact procedural protections that the Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination." *Id.* at 427.

Finally, Justice O'Connor also recognized that the Florida procedures for determining competency were constitutionally inadequate. Like Justice Powell, Justice O'Connor believed that Florida's failure to permit counsel for the inmate to participate in the competency determination and the Governor's exclusion of all advocacy from the parties involved violated the bedrock due process principle

of the opportunity to be heard. *Id.* at 430 (O'Connor, J., concurring in the result in part and dissenting in part, joined by White, J.).

Accordingly, this Court should find that the "final competency hearing" required by Article 4605(k) must include the right to participate through appointed counsel, the right to question and cross-examine witnesses, the right to present expert opinion differing from those offered by State or court-appointed experts, the right to explain the inadequacies of other competency evaluations, the right to discover the bases of any unfavorable expert reports, and the right to make argument.

A proposed order is attached for the Court's convenience. [Omitted In Printing]

Respectfully submitted,

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CAUSE NO. 3310

THE STATE OF TEXAS	§	**IN THE DISTRICT COURT OF**
V.	§	
SCOTT LOUIS PANETTI	§	**GILLESPIE COUNTY, TEXAS**
	§	**216TH JUDICIAL DISTRICT**

EX PARTE MOTION FOR PREPAYMENT OF FUNDS TO HIRE MENTAL HEALTH EXPERT TO ASSIST DEFENSE IN ARTICLE 46.05 PROCEEDINGS

(Filed Feb. 19, 2004)

Counsel for Defendant Scott Louis Panetti asks this Court to provide funds so that he can retain the services of a mental health expert to assist him in the Article 46.05 competency proceedings. Under *Ford v. Wainwright*, 477 U.S. 399 (1986), along with the Eighth and Fourteenth Amendments, an indigent death row inmate who has made a threshold showing of incompetence is entitled to funds to hire a mental health expert to assist counsel in reviewing the evaluations of court-appointed or State's experts, preparing for the competency proceedings, and presenting and questioning witnesses at a competency hearing. Mr. Panetti clearly made the requisite threshold showing in his last Article 46.05 motion. Accordingly, this Court must provide funds for counsel to obtain the assistance of a defense team mental health expert.

The Texas Legislature codified the process for determining whether a death row inmate is competent to be executed. Article 46.05(f) sets out the procedures where the court "shall order at least two mental health experts to

examine the defendant." However, these court-appointed experts are distinct from the defense team consulting expert counsel for Mr. Panetti seeks. The statute is silent on the critical issue of the prepayment of funds to enable counsel to retain a defense team expert to assist in the competency proceedings. Where constitutionally required procedures are not forbidden by statute – but are also not expressly permitted – the courts must temporarily provide a remedy until the legislature establishes a constitutionally sufficient procedure. Proceedings to determine Mr. Panetti's competency for execution must comport with the minimum due process guarantees enumerated in *Ford*. Once an inmate has made a threshold showing of incompetence, failure to approve the payment of funds for counsel to obtain the services of a defense team mental health expert would violate the minimum due process requirements set out in *Ford*.

Seven Justices in Ford expressed serious concerns about the constitutional adequacy of the procedures Florida employed to determine an inmate's competency to be executed. At the time, Florida law directed the Governor to stay the execution of a potentially insane inmate under a death sentence and appoint a commission of three psychiatrists to examine the inmate. *Id.* at 412. After receiving the commission's report, the Governor then made the determination whether the inmate was competent to be executed. *Id.* If the Governor concluded that the inmate was competent, he issued a death warrant. *Id.* at 413. In addition, the Governor specifically stated that the parties' attorneys should not participate in the competency determination in any adversarial manner. *Id.*

Although the Court could not agree on the minimum level of process required by the Constitution, five Justices

took for granted that the prisoner would have the assistance of a consulting mental health expert. Justice Marshall, joined by three other members of the Court, assumed that the condemned inmate would have the opportunity to present evidence from his own mental health expert during the competency proceedings. Recognizing that the probability of making a reliable decision increases when the factfinder can consider differing psychiatric opinions, Justice Marshall concluded that "without any adversarial assistance from the prisoner's representative – ***especially when the psychiatric opinion he proffers is based on much more extensive evaluation than that of the state-appointed commission*** – the factfinder loses the substantial benefit of potentially probative information." *Id.* at 414 (opinion of Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ.) (emphasis added).

In a separate concurring opinion, Justice Powell, like Justice Marshall, assumed that the death-sentenced inmate would have the assistance of a mental health expert separate from any State's experts or court-appointed experts:

> ***[The determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.*** Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

Id. at 424 (Powell, J., concurring impart and concurring in the judgment) (emphasis added). Although Justice Powell refused to define the exact procedural protections that the

Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement that included the need for a defense mental health expert: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, ***including expert psychiatric evidence that may differ from the State's own psychiatric examination***." *Id.* at 427 (emphasis added).

Clearly, *Ford* demands, through the Eighth and Fourteenth Amendments, that a death row inmate who has made a substantial threshold showing of incompetence be provided with the means to retain the services of a consulting mental health expert to assist him in the competency determination.

CONCLUSION

Counsel made a substantial threshold showing of Mr. Panetti's incompetency in the Article 46.05 motion filed on February 4, 2004. Once this threshold has been met, *Ford* requires the court to provide funds for counsel to hire a consulting mental health expert to assist in the competency determination. Nothing in Article 46.05 prohibits the disbursement of such funds. In fact, the Eighth and Fourteenth Amendments demand it for an indigent death row inmate like Mr. Panetti. Accordingly, this Court should provide undersigned counsel with reasonably necessary funds so that he may retain Michael R Arambula, M.D., R.Ph., to assist him in these competency proceedings.

Respectfully submitted,

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CAUSE NO. 3310

THE STATE OF TEXAS	)(	**IN THE DISTRICT**
	)(	**COURT OF**
	)(	
V.	)(	**GILLESPIE COUNTY,**
	)(	**TEXAS**
	)(	
	)(	**216TH JUDICIAL**
SCOTT LOUIS PANETTI	)(	**DISTRICT**

ORDER

(Filed Feb. 26, 2004)

Based on new Affidavits presented by Defense Counsel concerning the Defendant's present competency to be executed and in accordance with the Federal Court Order issued in this cause on February 4, 2004.

IT IS HEREBY ORDERED that Mr. Panetti's Renewed Motion to Determine Competency to be Executed is GRANTED. Mr. Panetti's execution scheduled for February 5, 2004, is STAYED pursuant to Judge Spark's Order. Pursuant to Art. 46.05(f) of the Code of Criminal Procedure, the following two mental health experts are appointed to examine the defendant to determine whether the defendant is incompetent to be executed:

Dr. Mary Anderson
Board Certified Psychiatrist
Austin, Texas
512/773-7741

and

Dr. George Parker
PHD Clinical Psychologist
Austin, Texas
512/458-8020

The standards for incompetency to be executed are those standards described by subsection (h) of Art. 46.05 of the Code of Criminal Procedure.

SIGNED this 20 day of February, 2004.

/s/ Stephen B. Ables
JUDGE PRESIDING

CAUSE NO. 3310

THE STATE OF TEXAS	§	**IN THE DISTRICT**
	§	**COURT OF GILLESPIE**
V.	§	**COUNTY, TEXAS**
SCOTT LOUIS PANETTI	§	
	§	**216TH JUDICIAL DISTRICT**

DEFENDANT'S MOTION TO RECONSIDER

(Filed March 4, 2004)

On February 25, 2004, this Court ruled that it would wait until the court-appointed mental health experts have completed their execution competency examinations of Defendant Scott Panetti to decide the majority of the motions defense counsel filed in an attempt to ensure a reliable and fair competency determination under *Ford v. Wainwright,* 477 U.S. 399 (1986), and the Eighth and Fourteenth Amendments. If this Court waits until after the expert examinations take place before ruling on the motions, its inaction will render a number of the motions moot. In effect, by delaying its ruling, the Court has already impliedly denied several of the motions. Accordingly, counsel for Mr. Panetti asks the Court to reconsider its decision on these motions.

On February 6, 2004, this Court ordered the parties to participate via telephone in a status conference in Mr. Panetti's case on February 9, 2004. On February 9, 2004, the Court ordered the Gillespie County District Attorney E. Bruce Curry and undersigned counsel Michael Gross to each provide it with the names of mental health experts that it should consider appointing under Article 46.05(f). The Court allowed the parties until February 20, 2004, to provide the experts' names. The Court also permitted the

parties to file, by February 20, 2004, any motions concerning the competency procedures under Article 46.05. The Court indicated that it would hold another telephonic status conference on that same date.

On February 19, 2004, counsel for Mr. Panetti filed ten motions related to the competency-to-be-executed proceedings under Article 46.05: (1) Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05 Proceedings; (2) Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings; (3) Ex Parte Motion for Prepayment of Funds to Hire Investigator to Assist Defense Counsel; (4) Motion for Member of Defense Team to Be Present During Expert Evaluations of Scott Panetti; (5) Defendant's Motion for Discovery; (6) Motion Asking Court to Refrain from Setting New Execution Date; (7) Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts; (8) Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti; (9) Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of *Ford*; and (10) Motion to Transcribe All Proceedings Related to the Competency Determination under Article 46.05.

The next day, February 20, 2004, counsel for Mr. Panetti provided, via fax, the Court and the District Attorney with the name of Dr. Randy Price, as a mental health expert the Court should appoint under Article 46.05(f). However, no status conference took place that day, as undersigned counsel believed there would. Undersigned counsel eventually contacted Judge Ables's court coordinator and was informed that the judge was out of

the office for the day. Counsel then contacted Mr. Curry. Mr. Curry informed counsel for Mr. Panetti that the Court had called him earlier in the week to let him know that it would appoint the mental health experts without input from the parties. Consequently, the Court canceled the status conference set for February 20, 2004. Counsel for Mr. Panetti was never informed of this development.

On Monday, February 23, 2004, counsel for Mr. Panetti received an order from the Court signed on February 20, 2004. In the order, the Court appointed two mental health experts, Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist, to exam Scott Panetti for his competency to be executed.

On February 25, 2004, at an informal, unrecorded status conference, the Court informed the parties that it would not rule on the defense motions until after the court-appointed experts had completed their competency evaluations. The Court stated that it would re-visit the motions if both court-appointed experts concluded that Mr. Panetti is competent to be executed.

A number of the motions counsel for Mr. Panetti filed on February 19, 2004, will be rendered moot if the Court waits to rule on them until after the court-appointed experts' examinations take place. In effect, the Court has impliedly denied these motions. The Court expressly denied the Motion to Videotape All Competency Examinations. The Court also denied the Motion for Discovery, stating that it would authorize the discovery of Mr. Panetti's records only if the State agreed. Accordingly, counsel for Mr. Panetti asks the Court to reconsider its rulings on the following motions: (1) Defendant's Motion for Appointment of Counsel to Assist Him in Article 46.05

Proceedings; (2) Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti; (3) Ex Parte Motion for Prepayment of Funds to Hire Mental Health Expert to Assist Defense in Article 46.05 Proceedings; (4) Ex Parte Motion for Prepayment of Funds to Hire Investigator to Assist Defense Counsel; (5) Motion for Member of Defense Team to Be Present During Expert Evaluations of Scott Panetti; (6) Defendant's Motion for Discovery; (7) Motion to Videotape All Competency Examinations of Scott Panetti Conducted by Court-Appointed Mental Health Experts; (8) Motion to Ensure that the Article 46.05 "Final Competency Hearing" Comports with the Procedural Due Process Requirements of *Ford*; and (9) Motion to Transcribe All Proceedings Related to the Competency Determination under Article 46.05.

1. Motion for Appointment of Counsel

The Court's continued failure to rule immediately on the Motion for Appointment of Counsel to Assist Mr. Panetti in the Article 46.05 Competency Proceedings fatally undermines Mr. Panetti's Eighth and Fourteenth Amendment rights under *Ford* for a fair, full, and reliable determination of his competency to be executed. This failure to appoint and compensate counsel is especially egregious now that the court-appointed experts are on the verge of conducting their examinations of Mr. Panetti. Undersigned counsel is representing Mr. Panetti pro bono, but he cannot continue to provide the State of Texas with his services free-of-charge. Counsel has prepared pro bono two Article 46.05 motions, ten motions related to the current competency proceedings, and this motion to reconsider. He has paid out-of-pocket costs to fly to Houston, rent a car, and interview Mr. Panetti in preparation

for filing the second Article 46.05 motion. In addition, he persuaded Dr. Mark Cunningham to conduct a preliminary examination of Mr. Panetti free-of-charge. Counsel is, in effect, subsidizing the State of Texas for the execution of his own client. All the other participants in this matter continue to be paid for their involvement in these proceedings. The Court's failure to officially appoint and reasonably compensate undersigned counsel – especially now that two experts have been appointed to exam [sic] Mr. Panetti – is in clear violation of *Ford*.

2. Motion to Set Out Protocol for Conducting Competency Evaluations

Without requiring the court-appointed mental health experts to abide by procedures that meet professional standards for conducting execution competency examinations, the Court cannot be confident that the experts' conclusions will withstand serious scrutiny. Only by identifying the accepted standards for carrying out these examinations ***before*** the experts begin their work can this Court ensure that the assessment techniques used by the court-appointed experts will meet the hallmarks of accuracy and trustworthiness necessary to satisfy *Ford*.

3. Motion for Funds to Hire Defense Team Mental Health Expert

In the absence of assistance from his own mental health expert to witness the examinations and review the work performed by the court-appointed experts, counsel will be unable to challenge the experts' conclusions to ensure that they are reliable. Counsel needs a defense

team expert immediately, before the court-appointed experts begin their examinations.

4. Motion for Funds to Hire Investigator

An objective and reliable assessment of competency that comports with professional standards of practice requires the collection of extensive records, in addition to interviewing collateral witnesses such as prior health care providers, family members, friends, fellow inmates, correctional officers, and spiritual advisors who have had contact with the inmate over the past few years. Counsel for Mr. Panetti needs the assistance of an investigator immediately, to obtain the documentation and conduct the interviews of collateral contacts. Without this critical information, the court-appointed mental health experts will be unable to make a reliable determination of competency.

5. Motion for Member of Defense Team to Be Present During Evaluations

The presence of counsel or some other member of the defense team during the experts' evaluations is required so that the defense can assess the nature and reliability of the evaluations and, if appropriate, offer expert rebuttal evidence to them. Obviously, delaying a ruling on this motion until after the expert examinations have taken place will render it moot and impliedly denied.

6. Motion for Discovery

To conduct competency examinations that meet professional standards, the court-appointed experts will

need to review documents that are in the exclusive possession of state agencies, like county jail records and TDCJ medical files. Court-ordered discovery will ensure that the experts are provided with the complete records of Mr. Panetti. The experts must review these records before they can make a reliable determination of competency.

7. Motion to Videotape All Competency Examinations

Videotaping will enable counsel's mental health expert to independently assess the adequacy of the examinations performed by the court-appointed experts. Moreover, videotaping will allow the Court to review firsthand compelling evidence of Mr. Panetti's current mental condition, subject the evidence to serious scrutiny, and reduce the possibility of making an unreliable competency determination. Finally, videotaping will permit counsel to preserve evidence for federal review should this Court find Mr. Panetti competent. The Court's express denial of this motion is especially problematic in light of its implicit denial of counsel's request for a member of the defense team to be present during the experts' examinations.

8. Motion to Ensure Due Process at Competency Hearing

By refusing to allow the prepayment of funds for counsel to hire his own mental health expert, refusing to permit a defense team member to be present during the court-appointed experts' examinations, and refusing to allow videotaping of the experts' examinations, this Court will render the final competency hearing unfair. Without the assistance of a defense team expert, especially one who was present during the court-appointed experts' examinations – or

who at least had the opportunity to review a videotape of the examinations after-the-fact – counsel for Mr. Panetti will be unable to challenge the experts or explain the inadequacies of their competency evaluations at the hearing. Such a proceeding does not comport with the minimum due process standards announced in *Ford*.

9. Motion to Transcribe All Proceedings

None of the status conferences conducted by the Court thus far have been recorded or transcribed. Because the federal district court and the U.S. Court of Appeals for the Fifth Circuit will have the opportunity to review this Court's resolution of Mr. Panetti's competency-to-be-executed claim – should this Court find him competent – the need for a complete record is critical to counsel's ability to preserve and present issues for federal review. Transcribing all proceedings related to the competency determination must begin immediately, because the Court has been deciding significant issues and ruling on important motions in the absence of a court reporter. The lack of a complete and accurate record of these proceedings will hamper counsel's ability to seek review of the Court's decisions in the federal courts.

ACCORDINGLY, the Court should reconsider its decision of February 25, 2004, rendering moot and denying the majority of the defense motions by refusing to explicitly address the motions until after the court-appointed mental health experts have completed their competency evaluations of Mr. Panetti.

A proposed order is attached for the Court's convenience. [Omitted In Printing]

Respectfully submitted,

/s/ Michael C. Gross

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Attorney for the Defendant,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

GEORGE V. C. PARKER, PH. D.
CLINICAL AND FORENSIC PSYCHOLOGY
CONFIDENTIAL INFORMATION

April 28, 2004

Honorable Stephen Ables
216th Judicial District Court
Kerr County Courthouse
700 Main Street
Kerrville, Texas 78028

Re: Cause No. 3310; State of Texas vs. Scott Louis Panetti
216th Judicial District Court, Gillespie County, Texas

Dear Judge Ables:

Mary Anderson, M.D. and George Parker, Ph.D. are writing this to you as a report of our evaluation of Scott Panetti, whom we saw on March 24, 2004 at the TDCJ Polunsky Unit located in Livingston, Texas.

Pursuant to your court order, our plan was to perform a psychiatric/psychological interview of Mr. Panetti, and to administer at least one personality assessment psychometric study (Personality assessment Inventory) to him. Our intent was to gather data that would permit us to provide our professional opinions regarding the issues specified in Article 46.05 of the Texas Code of Criminal Procedure.

OVERVIEW OF OUR INTERVIEW:

Throughout our interview, Mr. Panetti was uncooperative. He ignored our repeated questions about matters such as why he is in prison and whether he had been convicted of capital murder. He even avoided answering our question about where he had grown up. He responded to our questions by filibustering about the Bible and the Lord. Our attempts to redirect him were met with irritable scorn,

accusations that we lied to him, and/or excursions into prayer and hymn singing.

DETAILS OF OUR INTERVIEW:

We found Mr. Panetti seated and waiting for us as we entered the interview room. It became clear from the very beginning that Mr. Panetti intended to control the interview. His controlling behavior began even as we were seating ourselves. He did not respond to our greetings. With glowering countenance, he immediately asked, first of Dr. Parker, then of Dr. Anderson, "Are you a Christian?"

Initially, neither of us responded to his question. As Mr. Panetti glowered at us, we identified ourselves by name and profession, and explained to him the nature of our visit.

We told him that we were court appointed by Judge Ables for the purpose of evaluating him regarding the issue of his competence to be executed. We told him that what transpired during our interview with him was not confidential, and that it could be used against him in a court of law. Mr. Panetti continued to glower, and when we asked him whether he understood the purpose and nature of our visit, his response was to reiterate: "Are you a Christian?" We explained to him that we needed to talk to him about himself, not about our religious beliefs, and that there were some specific questions that we needed to ask him. He stubbornly persisted with his question, and began preaching to us about the Bible and the Lord. After several minutes, it became clear that we were at loggerheads, and that Mr. Panetti was not going to respond to our questions unless we answered his question. Therefore, in an effort to encourage Mr. Panetti's cooperation and get the interview moving, we disclosed to him that we are Christians.

Unfortunately, that seemed to make the situation worse. Because now, continuing to glower at us, he told us that we were liars. Since it is important that there be at least a reasonable degree of trust in the evaluation relationship, we attempted to resolve the liar/trust issue. But that was largely to no avail. He refused to tell us why he labeled us liars.

Examples of Mr. Panetti's Interview Responses:

Q. Why are you here in prison?
A. In order to preach the gospel of the Living King.

Q. Is there another reason why you're here in prison?
A. That's all been documented. You can look at the documents.

Q. Sir, did you kill somebody?
A. That's what they put in the newspapers that publish lies. I'm only a messenger . . . pray for peace in Jerusalem. (He then launched into prayer, referred to Article 33 of the UCMJ, loudly sang Onward Christian Soldiers, and talked about how AA wants to keep you coming back).

Q. You are on death row right now. Why?
A. They don't want me to preach the Word of God.

Q. Who are "They"?
A. You can't understand unless you accept the Lord. Is your name on the Book of Life?

Q. Are you saying that you didn't kill some people? I'm asking you a direct question and you're not giving me a direct answer. Were you convicted of capital murder?
A. You tell me lies and I'm telling you the truth. You want to hear it from the horse's mouth, and the horse isn't saying what you want.

Q. Were you convicted of capital murder?
A. I have lost the ability to choose. I do not know right from wrong. But the Lord does. And so I follow the Lord.

Q. Were you convicted of capital murder? Just yes or no?
A. All answers are in the Bible.

Q. I'm asking you a direct question. How come you won't give me a direct answer?
A. Do unto others as you would have them do unto you. Do you remember the first question I asked you?

And so it went for an hour.

DOCUMENTS AND COLLATERAL DATA RELIED UPON: In view of Mr. Panetti's refusal to talk with us about the issues at hand, it was especially important for us to rely upon collateral data to help establish a basis for our professional opinions. These data included:

1. Current TDCJ Medical Chart

2. Current Administrative Chart including visitor's log

3. Discussions with prison staff:

– The medical records administrator told us that the day previous to our visit she went to Mr. Pannetti asking him to sign a release of records for Drs. Parker and Anderson. Mr. Pannetti, however, refused to sign it, saying that his lawyer had not told him to do so.

– From our discussion with the Polunski Unit senior Death Row officer (Major Steve Miller), we learned that Major Miller's opinion is that Mr. Panetti clearly understands that he is to be executed, and that he knows why he is to be executed.

– Major Miller also informed us about the existence of Mr. Panetti's Execution Packet, which contains information showing that Mr. Panetti understood that his execution was imminent, and that he would die from his execution. Mr. Panetti's Execution Packet is dated January 22, 2004.

4. Review of several letters (personal correspondence) which Mr. Panetti has recently written to friends and family. Consistent with his preoccupation with religion, these letters contain numerous Biblical references. However, these letters also contain text which reveals that Mr. Panetti is able to form and verbalize normal, socially-appropriate thoughts when he chooses to do so.

5. Competency Trial Transcripts 09/09/94 Vols. 13 and 14 of 43.

6. Petition for a Recommendation of a Reprieve from Execution and a Commutation of Death Sentence. Before the Texas Board of Pardons and Parole.

7. Defendant's Motion to Determine Competency to be Executed.

8. Order Denying Applicant's Motion to Determine Competency to be Executed.

9. Order Granting Motion to Determine Competency [216th Judicial District Court]

10. Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations of Scott Panetti.

11. Orders to Disclose Records from 216th Judicial District Court of Gillespie County.

12. Code of Criminal Procedure Article 46.05 Competency to be Executed.

13. Mr. Panetti's TDCJ Medical and Administrative Records 1995-2004.

14. Psychiatric Evaluation Report from E. Lee Simes, M.D. dated 11/06/92.

OPINIONS

The following are our opinions to a reasonable degree of psychiatric and psychological probability:

1. Mr. Panetti is able to understand direct questions about his past as well as his present situation, and he could answer questions about relevant legal issues regarding his execution if he were willing to do so.
2. Mr. Panetti consciously chose not to answer our interview questions about his past and his present, as well as questions about legal aspects of his execution.
3. Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation by deflecting the interview into religious topics.
4. Mr. Panetti knows that he is to be executed, and that his execution will result in his death.
5. Although Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason he is to be executed.

We will be available to answer any questions that you may have about the above.

Sincerely,

/s/ Mary I. Anderson, M.D.
Mary I. Anderson, M.D.

/s/ G. Parker, Ph.D.
George Parker, Ph.D.

[SEAL]

STEPHEN B. ABLES
DISTRICT JUDGE
216TH JUDICIAL DISTRICT COURT
KERR COUNTY COURTHOUSE
700 MAIN STREET
KERRVILLE, TEXAS 78028

[Names And Other Addresses Omitted In Printing]

May 14, 2004

(Filed May 18, 2004)

Mr. Bruce Curry 896.2620
Attorney at Law
521 Earl Garrett
Kerrville, Texas 78028

Mr. Michael Gross 210.354.1920
Attorney at Law
106 S. St. Mary's Street, Suite 260
San Antonio, Texas 78205

Re: Cause No. 3310
The State of Texas v. Scott Louis Panetti

Dear Counsel:

It appears from the evaluations performed by Dr. Mary Anderson and Dr. George Parker that they are of the opinion that Mr. Panetti is competent to be executed in accordance with the standards set out in Art. 46.05 of the Code of Criminal Procedure.

Mr. Gross, if you have any other matters you wish to have considered, please file them in the case papers and get me copies by 5:00 p.m. on May 21, 2004.

Very truly yours,

/s/ Stephen B. Ables
Stephen B. Ables
216th District Judge

SBA:bh

CAUSE NO. 3310

THE STATE OF TEXAS	§	IN THE DISTRICT COURT
V.	§	OF GILLESPIE COUNTY,
	§	TEXAS
SCOTT LOUIS PANETTI	§	216TH JUDICIAL DISTRICT
	§	

OBJECTIONS TO EXPERTS' REPORT, RENEWED MOTION FOR FUNDS TO HIRE MENTAL HEALTH EXPERT AND INVESTIGATOR, RENEWED MOTION FOR APPOINTMENT OF COUNSEL, AND MOTION FOR COMPETENCY HEARING

(Filed May 21, 2004)

(File Stamped May 24, 2004)

Counsel for Defendant Scott Panetti objects to the methods employed and the conclusions reached by the court-appointed experts. He urges the Court to give the experts' opinions no credence. Counsel's objections to the appointed experts' ultimate conclusions are by necessity limited, however, because Counsel does not possess any expertise in the field of mental illness and is without the assistance of his own expert. Accordingly, Counsel renews his request for funds to hire a defense mental health expert to evaluate Mr. Panetti, review the court-appointed experts' report, and assist Counsel in questioning those experts at an evidentiary hearing. Counsel also seeks funds to hire an investigator to assist him in identifying, collecting, and reviewing collateral documents related to Mr. Panetti's current and past mental functioning. Counsel renews his request for the Court to appoint him nunc pro tunc to February 4, 2004, because he has been providing extensive services to Mr. Panetti without compensation in this matter since that time. Finally, Counsel asks

this Court to order a "final competency hearing" as mandated by Article 46.05.

I. OBJECTIONS TO EXPERTS' REPORT

Identifying the standards for conducting competency evaluations enables the courts to make informed decisions whether the assessment techniques used by mental health experts meet the hallmarks of accuracy and trustworthiness necessary to satisfy *Ford v. Wainwright,* 477 U.S. 399 (1986), and the Eighth and Fourteenth Amendments. Only by ordering the appointed mental health experts to adhere to accepted practices for determining competency can the courts ensure that justice will not be doled out arbitrarily and that the truly incompetent will not be executed. The use of increasingly sophisticated protocols for assessing execution competency should discourage simplistic "drive-by" *Ford* examinations by inexperienced and unqualified court-appointed metal health experts left to their own devices. The professional literature describes the standard of practice in assessing an inmate's execution competency. *See* P.A. Zapf, et. al, *Assessment of Competency for Execution: Professional Guidelines and an Evaluation Checklist,* 21 BEHAV. SCI. LAW 103-20 (2003) (hereinafter "*Professional Guidelines*") (attached as Exhibit 1 to Motion Seeking Order Setting Out Protocol for Conducting Competency Evaluations); Bruce Ebert, Ph.D., J.D., ABPP, *Competency to Be Executed: A Proposed Instrument to Evaluate an Inmate's Level of Competency in Light of the Eighth Amendment Prohibition Against the Execution of the Presently Insane,* 25 LAW & PSYCHOLOGY REV. 29 (Spring 2001) (hereinafter "Ebert").

The report authored by the court-appointed experts, Dr. George Parker and Dr. Mary Anderson, confirms Counsel's fear that, in the absence of an order requiring the experts to follow professional standards in conducting a determination of competency for execution, a "drive-by" examination would result. The evaluation was incomplete, the collection of collateral data minimal, and the opinions contained in the report biased and conclusory. The court-appointed experts' competency determination is unreliable. This Court should not resolve the issues based on it.

A. Article 46.05 requires separate evaluations and reports from at least two experts – not a joint examination and a single, co-authored report.

Once the trial court determines that the defendant has made a substantial showing of incompetency to be executed, Article 46.05 requires the appointment of "at least two mental health experts" to examine the defendant. TEX. CODE CRIM. PRO. art. 46.05(f). The mental health experts must then provide "copies of ***their reports***" to the trial court and the parties. TEX. CODE CRIM. PRO. art. 46.05(i) (emphasis added); *see* art. 46.05(k) (referring to the "***reports*** provided under Subsection (i)") (emphasis added). Article 46.05's express reference to "reports" plainly means that the trial court shall have the benefit of at least ***two*** reports – one from each of the minimum number of experts required to be appointed under the statute. The rationale for such a requirement is obvious: facilitating the trial court's ability to make a reliable determination of competency by providing it with at least two independent evaluations and conclusions. The appointment of two mental health experts who then conduct

a joint examination and file a single, joint report defeats the statute's purpose. The procedure adopted by the mental health experts in Mr. Panetti's case deprived the Court of at least two independent judgments and reports on Mr. Panetti's competence. Article 46.05 requires the Court to appoint another mental health expert to conduct an evaluation and write a report.

B. The court-appointed experts visited Mr. Panetti only once. The Professional Guidelines emphasize the need for multiple visits.

Evaluating a prisoner's competency for execution in accordance with professional norms requires multiple interviews under conditions adequate to assess the prisoner's functioning: "CFE [Competency For Execution] evaluators should seek to meet with the offender ***on more than one occasion as part of an assessment of consistency, deterioration, improvement, and other changes.***" *Professional Guidelines* at 109 (emphasis added). Ebert agrees that the need to see the inmate more than once is an essential component of a comprehensive and reliable determination of competency:

> There is no substitute for a clinical interview of the inmate by the mental health professional which should encompass spending time with the inmate and discussing the inmate's life in prison. ***The doctor should meet with the inmate continually with multiple visits lasting one to two hours each. Often testing and evaluating an inmate can last up to eight hours. A minimum of three to four clinical interviews are usually necessary to properly and thoroughly evaluate an inmate's competency to be executed.*** Furthermore, as the amount of

> time the mental health professional spends with the inmate increases, the clinical database increases and provides more information about the inmate. Though the clinical interview is often under emphasized, it is used more adeptly by psychiatrists.

Ebert at 51.

According to the experts' report, Dr. Parker and Dr. Anderson attempted to interview Mr. Panetti, simultaneously, for one hour on only a single occasion. Experts' Report at 1, 3. This is not acceptable practice, especially when the experts believe the inmate is being uncooperative. The experts made no second attempt to establish a degree of trust with Mr. Panetti or overcome what they perceived as his controlling and manipulative behavior. They could make no assessment of the consistency, improvement, or deterioration of his condition over a period of time. Instead, they simply abandoned the clinical interview, one of the most critical tools in the competency evaluation. *See* Ebert at 51 ("Direct observation and interviews of the inmate are of critical importance in the evaluation of competency").

C. The court-appointed experts conducted no psychological testing. The Professional Guidelines emphasize that psychological testing is an essential component of a reliable determination of execution competency.

According to the *Professional Guidelines,* the competency determination must involve psychological testing:

> CFE evaluators should be aware of the psycholegal abilities required of a competent offender. In the absence of a standardized assessment instrument specifically developed to assess the psycholegal criteria for a given jurisdiction, the evaluator should operationalize the applicable psycholegal criteria. Evaluators should focus on the functional abilities of the offender, in addition to the mental state of the offender and the appropriate diagnosis of a mental disorder, and should document how any functional deficits may be causally related to mental, emotional, or intellectual deficits.

Id. at 110. This is consistent with the reported practices of mental health experts experienced with evaluating competency for execution: "The CFE evaluators reported using a number of different psychological tests during CFE evaluations." *Id.* at 112.

Similarly, Ebert notes that the competency examination should include psychological testing. The expert should also administer a battery of intellectual measure, including tests that document language skills, memory, and cognition. Ebert at 49-50. Ebert also stresses the need for conducting a mental status examination to ascertain whether the inmate is experiencing any severe symptoms of psychopathology such as hallucinations, delusions, illusions, tangentiality, or loose associations. *Id.* at 48. "In summation, testing procedures administered to an inmate subject to execution should be thorough and conducted to the fullest and most accurate extent possible so as to avoid misdiagnosis or other misevaluations." *Id.* at 50.

The court-appointed experts did not conduct any psychological testing of Mr. Panetti's current mental and intellectual functioning. They did not attempt to determine

whether he suffers from any mental illness. They failed to take into account his documented, twenty-year history of schizophrenia. The lack of psychological testing calls into serious question the accuracy of their conclusions.

D. The court-appointed experts' collection and review of collateral information was haphazard and incomplete.

The experts' report lists fourteen pieces of collateral information that the experts reviewed and relied upon in making their competency determination, Experts' Report at 3-4. At first glance, this list may appear comprehensive. When compared to the minimum standards for an adequate and reliable competency determination, it quickly becomes apparent that the experts failed to gather collateral information from an array of important sources.

Ebert has identified a lengthy list of information critically important to developing a complete social history so that the expert can fully understand the inmate's current situation. Background history includes asking detailed questions in the following areas:

(1) Military Background
(2) Educational History
(3) Marital and Relationship History
(4) Legal Background
(5) Sexual History
(6) Medical History
(7) Psychological and Psychiatric History
(8) Family History
(9) Employment History
(10) Developmental History
(11) Alcohol and Drug History
(12) Social Functioning/History

(13) Disciplinary History while in Prison
(14) History of Transfers from Various Prisons and Reason for Them.

Ebert at 47-48.

The *Professional Guidelines* note that, to evaluate a prisoner's competency for execution in accordance with professional norms, mental health experts require access to a wide range of information:

> CFE evaluators should collect collateral information about the offender's previous and current functioning, as well as his or her functioning while on death row (including any specific behaviors that the offender has engaged in that might be relevant to psycholegal understanding). Friends and family of the offender who can comment on previous and current functioning and characteristics should be interviewed. Correctional officers, prison physicians and psychologists, and other prisoners should be asked to comment on the behavior of the offender while in the institution. Medical records and psychiatric history both within and outside the correctional institution should he gathered and evaluated.

Professional Guidelines at 110-11 (footnote omitted).

Ebert also strongly recommends interviewing collateral contacts. According to Ebert, "collateral contact" is "a common term used in forensic evaluations and involves interviewing people, such as prior health care providers and psychiatrists/psychologists who have treated or evaluated the inmate, the inmate's family members, counsel for the inmate, the spouse or the offspring of the inmate, fellow inmates who have interacted with the inmate, correctional officers and religious personnel who have had contact with the inmate, friends who have

visited the inmate over the past few years (to identify the period of incompetency) and any other individuals who have witnessed the inmate's behaviors." Ebert at 50 n.156. Collateral contacts may offer crucial information that the evaluator can then compare with objective sources of data, such as psychological testing. *Id.* at 50.

Like the *Professional Guidelines,* Ebert recognizes the importance of conducting an exhaustive review of the inmate's records to assist an evaluator in determining the true level of competency or incompetency of an inmate. This review should include, but is not limited to, the following records and documents:

(1) prison medical records;
(2) prison psychiatric records;
(3) psychiatric records prior to incarceration;
(4) academic records, including prior intellectual testing with raw data;
(5) records of past psychological evaluations;
(6) any and all videotapes made of the inmate;
(7) military or veterans affairs records;
(8) records/transcripts of testimony of the inmate;
(9) writings/letters of the inmate with the prior year;
(10) videotapes of the inmate demonstrating bizarre behavior; and
(11) art work of the inmate.

Id. at 49-50.

The court-appointed experts's collection of collateral data was woefully inadequate. A number of documents the experts listed clearly had no bearing on Mr. Panetti's previous or current mental and intellectual functioning: Order Denying Motion to Determine Competency (Item no. 8), Order Granting Motion to Determine Competency (Item no. 9), Motion Seeking Order Setting Out Protocol

for Conducting Competency Evaluations (Item no. 10), Orders to Disclose Records (Item no. 11), and Article 46.05 of the Code of Criminal Procedure (Item no. 12). *See* Experts' Report at 3-4. Other documents the experts reviewed did have some relevance to Mr. Panetti's mental status: TDCJ medical and administrative records (Item nos. 1, 2, 13), some personal correspondence (Item no. 4), transcripts from one of the competency trials (Item no. 5), the clemency petition (Item no. 6), Motion to Determine Competency (Item no. 7), and a 1992 psychiatric evaluation report (Item no. 14). *Id.* However, the experts made no effort to obtain or review a significant portion of the kinds of collateral documents necessary for an expert to make a reliable competency determination. The court-appointed experts did not collect numerous medical and psychiatric records from Mr. Panetti's stays at Kerrville State Hospital, Starlite Village, Waco Veterans Administration Hospital, Tomah Veterans Administration Hospital, Northern Pines Unified Service, Cumberland Memorial Hospital, and the Bell County Jail. They did not review the transcript of Mr. Panetti's first competency trial that ended in a hung jury. They did not read the transcripts of Mr. Panetti's capital murder trial, in which he testified and represented himself. They did not obtain his military records. They did not review his academic records. They did not obtain a family history, marital and relationship history, alcohol and drug history, employment history, social functioning and development history, educational history, or medical history.

The court-appointed experts conducted interviews with only two collateral contacts – a TDCJ medical records administrator and a correctional officer. *Id.* at 3-4. The experts did not speak with any prison psychiatrists or

psychologists. They did not talk to other prisoners housed near Mr. Panetti. They did not interview mental health professionals who treated Mr. Panetti during his many previous hospitalizations. They did not attempt to speak with Mr. Panetti's ex-wife or his parents. They did not talk to spiritual advisors or friends who had recently visited Mr. Panetti. They made no effort to observe Mr. Panetti in his prison cell. It is clear that a significant amount of document collection, social history investigation, and collateral contact interviews must be completed before any evaluation can proceed under the professional standard of care governing competency-to-be-executed determinations.

E. The court-appointed experts' competency determination is conclusory and fails to take into account Mr. Panetti's lengthy and well-documented history of severe mental illness.

The report of the court-appointed experts is incomplete, biased, and conclusory. The inadequacy of the report is unsurprising, given the experts' failure to meet with Mr. Panetti more than once, their inability to conduct any psychological or intellectual testing, their incomplete collection and review of collateral documents, and their reluctance to interview a wide range of collateral contacts. Under these conditions, qualified mental health professionals should flatly refuse to make a competency determination. Unfortunately, the court-appointed experts had no qualms about voicing their opinions.

A careful review of the experts' report reveals its many shortcomings. Beginning on the first page, the experts' biases are evident. The experts immediately describe Mr. Panetti as "uncooperative" – "ignoring" and "avoiding"

repeated questions relevant to the *Ford* inquiry. Experts' Report at 1. The experts characterize Mr. Panetti's responses as "filibustering about the Bible and the Lord." *Id.* The experts describe their futile attempts to redirect Mr. Panetti as being met "with irritable scorn, accusations that we lied to him, and/or excursions into prayer and hymn singing." *Id.* They state, "It became clear from the very beginning that Mr. Panetti intended to control the interview." *Id.* Four times, the report uses the word "glower" to describe Mr. Panetti's expression while he "stubbornly persist[s]" with his question to Dr. Anderson: "Are you a Christian?" *Id.* at 1-2.

After attempting to explain the reason for their visit, the experts said that "it became clear we were at loggerheads." *Id.* at 2. Reluctantly, they answered Mr. Panetti's question affirmatively. *Id.* The experts then realized that answering the question made the situation worse. Mr. Panetti accused them of being "liars." *Id.* The experts eventually conceded that they were unable to establish "a reasonable degree of trust in the evaluation relationship." *Id.* The report then includes a lengthy colloquy between the experts and Mr. Panetti, in which Mr. Panetti answers their *Ford* inquiries with references to the Bible and the Lord. He does, however, unambiguously state that he is on death row, because "[t]hey don't want me to preach the Word of God." *Id.* The experts continued their questioning for an hour before terminating the clinical interview. *Id.* They abandoned their plan "to perform a psychiatric/psychological interview of Mr. Panetti, and to administer at least one personality assessment psychometric study (Personality Assessment Inventory) to him." *See id.* at 1. They made no attempt to re-visit Mr. Panetti on another date.

Because of Mr. Panetti's "refusal to talk with [the experts] about the issues at hand," the experts emphasized the importance of relying on collateral data instead to form their opinions. *Id.* at 3. Unfortunately, as noted in Part I-D, *supra*, the experts reviewed only a small portion of the vast array of collateral information relevant to making a reliable competency determination that conforms with professional standards. Their discussion with the TDCJ medical records administrator is particularly unilluminating. The administrator stated that Mr. Panetti refused to sign a records release form, because "his lawyer had not told him to do so." *Id.* at 4. The report also notes the experts' conversation with a correctional officer, who gives his conclusory opinion that Mr. Panetti "understands that he is to be executed, and that he knows why he is to be executed." *Id.* The report provides no additional information that explains how often this correctional officer interacted with Mr. Panetti, how long he has known Mr. Panetti, whether Mr. Panetti's behavior has been consistent during the time he has known him, or even how he formed his opinion about Mr. Panetti's competency. Finally, the experts describe their review of some of Mr. Panetti's personal correspondence: "Consistent with his preoccupation with religion, these letters contain numerous Biblical references. However, these letters also contain text which reveals that Mr. Panetti is able to form and verbalize normal, socially-appropriate thoughts when he chooses to do so." *Id.*

After setting out the laundry list of collateral documents they reviewed, the court-appointed experts then immediately set out their conclusions in summary fashion – without any logical explanation, without any deductive reasoning, without any careful extrapolation based on the

documents they reviewed, their interviews with collateral contacts, or their conversation with Mr. Panetti. This is, by far, the most stunning aspect of the entire report. It leaves the reader to wonder whether the experts omitted several pages of their report. The experts' failure to explain their findings is simply another indicator of the "drive-by" nature of their competency evaluation.

The experts set out five conclusions on the final page of the report:

> 1. Mr. Panetti is able to understand direct questions about his past as well as his present condition, and he could answer questions about relevant legal issues regarding his execution if he were willing to do so.
>
> 2. Mr. Panetti consciously chose not to answer our interview questions about his past and his present, as well as questions about legal aspects of his execution.
>
> 3. Mr. Panetti deliberately and persistently chose to control and manipulate our interview situation by deflecting the interview into religious topics.
>
> 4. Mr. Panetti knows that he is to be executed, and that his execution will result in his death.
>
> 5. Although Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason he is to be executed.

Id. at 5.

It is difficult, if not impossible, for the reader to comprehend these conclusions based on the four pages of the report that preceded them. Not once did the court-appointed experts acknowledge that Mr. Panetti has a long

and undisputed history of suffering from schizophrenia. Nowhere do the experts consider the possibility that what they perceived as Mr. Panetti's "controlling" and "manipulative" behavior – as well as his occasional interludes of lucidity – are characteristic of persons diagnosed with schizophrenia. Their conclusion that Mr. Panetti was "consciously" and "deliberately" choosing to be uncooperative, without even struggling over whether this behavior was indeed a conscious choice or, instead, a manifestation of his mental illness, is breathtaking.[1] In a similar fashion, the experts characterize his ramblings about the Bible and the Lord as a harmless "preoccupation with religion," *id.* at 4, rather than the foundation of his elaborate delusional system. Finally, in light of Mr. Panetti's clearly-stated response to the *Ford* inquiry that he is on death row because "[t]hey don't want me to preach the Word of God," *id.* at 2, it is difficult to follow how the experts could have

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[1] Although the court-appointed experts do not explicitly state it, their use of words like "control and manipulate," "deliberately and persistently chose," and "consciously chose" to describe Mr. Panetti's behavior during the interview suggests that they believe Mr. Panetti is malingering mental illness. If this is indeed what the experts are implying, their opinion contradicts two decades' worth of his documented mental health history. On occasion, and without resort to any of the currently accepted assessment and evaluation mechanisms, mental health professionals will decide that an inmate is malingering mental illness, and will essentially "trump" a serious competency examination by concluding that the inmate is malingering, and therefore is probably competent. However, well-respected literature describes what would be acceptable. Knowledgeable experts have discussed the politics of the assessment of malingering, and the science involved in such assessments. Rogers, CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION (2d ed. 1997). The court-appointed experts administered no assessment mechanisms to test for malingering. The Court should reject the experts' implicit and wholly unfounded suggestion that Mr. Panetti is malingering.

concluded that Mr. Panetti "understand[s] the reason he is to be executed." *Id.* at 5.

The brief interview that Dr. Mark D. Cunningham performed three months ago is instructive, because Dr. Cunningham reached dramatically different conclusions based on his witnessing nearly identical behavior by Mr. Panetti. On February 3, 2004, Dr. Cunningham, a clinical and forensic psychologist, conducted a pro bono, preliminary mental health evaluation of Mr. Panetti. Dr. Cunningham prepared a report of his impressions, which Counsel attached to his Renewed Motion to Determine Competency to be Executed.

Dr. Cunningham found that Mr. Panetti's thought processes are "markedly disorganized, so that it is impossible for him to maintain a linear and logical train of thought." Cunningham Report at 1. He said that Mr. Panetti exhibits "flight of ideas (spontaneously shifting in conversation from one topic to another with no obvious connection; tangentiality (using any inquiry as a starting point to expand into other subjects); and circumstantiality (providing excessive and irrelevant detail)." *Id.* More important, Dr. Cunningham found that:

> Mr. Panetti exhibited delusional beliefs incorporating both grandiosity and paranoia. He expressed a conviction that he is the target of evil forces that would seek to prevent him from preaching the gospel. He described that the Satanic forces arrayed against him included not only the Wicken [sic] national headquarters in Wisconsin, but also reached even into "the administration." ***Mr. Panetti attributed the primary reason for his execution to the efforts***

> ***of these evil forces to prevent him from continuing to preach the gospel.***

Id. (emphasis added). Dr. Cunningham diagnosed Mr. Panetti as "actively psychotic" and "suffer[ing] from a disorder on the Schizophrenic and/or Schizoaffective spectrum." *Id.* at 2. He concluded that Mr. Panetti is not malingering. *Id.*

"[T]he more unstructured and vague the criteria and goals are for any given task, the more likely it is that a clinician's own values and biases will impose on the task." *Professional Guidelines* at 108. Unfortunately, that is exactly what happened with the court-appointed experts. Their refusal to follow accepted professional standards for competency-to-be-executed examinations undermined the integrity of their opinions. Their failure to adhere to professional norms calls into serious question the accuracy and reliability of their conclusions. Accordingly, the Court should give no credence to the court-appointed experts' report. Instead, it should appoint another expert, and order that expert to conduct a competency evaluation in accordance with the Professional Guidelines and produce a second report for the Court's benefit, as required under Article 46.05.

II. THE RENEWED MOTIONS

Counsel for Mr. Panetti renews his previous motions for funds to hire a mental health expert and investigator, and for appointment of counsel, Counsel refers the Court to the motions he has previously filed on these issues to find more detailed legal argument. He summarizes those arguments below.

A. Motion for Funds to Hire Mental Health Expert

Counsel for Mr. Panetti is, obviously, at a severe disadvantage in reviewing the adequacy and reliability of the procedures used and the conclusions reached by the court-appointed experts. He has no expertise in this area. For this reason, it is imperative that the Court provide him with funds so that he may retain his own mental health expert to assist him. In *Ford v. Wainwright*, 477 U.S. 399 (1986), Justice Powell assumed that the death-sentenced inmate would have the assistance of a mental health expert separate from any State's experts or court-appointed experts:

> ***[T]he determination of petitioner's sanity appears to have been made solely on the basis of the examinations performed by state-appointed psychiatrists.*** Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations.

Id. at 424 (Powell, J., concurring in part and concurring in the judgment) (emphasis added). Although Justice Powell refused to define the exact procedural protections that the Fourteenth Amendment's Due Process Clause imposes on the states' competency determinations, he did announce one fundamental requirement that included the need for a defense mental health expert: "The State should provide an impartial officer or board that can receive evidence and argument from the prisoner's counsel, ***including expert psychiatric evidence that may differ from the State's own psychiatric examination***." *Id.* at 427 (emphasis added). Clearly, *Ford* demands, through the Eighth and

Fourteenth Amendments, that a death row inmate who has made a substantial threshold showing of incompetence be provided with the means to retain the services of a consulting mental health expert to assist him in the competency determination.

B. Motion for Funds to Hire Investigator

The Professional Guidelines recognize that an objective and reliable assessment of competency requires the collection of extensive social history records, prior psychological and psychiatric evaluations, medical records, and many other types of documentation. Identifying and obtaining all of the relevant collateral documents, along with interviewing mental health professionals, friends and family, correctional staff, and other prisoners is a time-consuming task. Hiring an investigator who can gather this crucial information is more cost-effective than requiring either the mental health experts or Counsel to perform these tasks. Accordingly, this Court should provide funds for Counsel to retain an investigator to assist him in these competency proceedings.

C. Motion for Appointment of Counsel

Ford assumes that an inmate who makes a substantial threshold showing of incompetence will be represented by counsel during the competency determination proceedings. In appointing at least two mental health experts, this Court has concluded that Mr. Panetti made such a threshold showing in his last Article 46.05 motion. Accordingly, this Court should now appoint undersigned counsel and reasonably compensate him nunc pro tunc to February 4, 2004.

III. MOTION FOR COMPETENCY HEARING

Once an inmate has made a substantial showing of incompetency, not only must the trial court appoint at least two mental health experts, but it also must eventually hold a "final competency hearing" before it makes a determination of the inmate's competency to be executed. *See* TEX. CODE CRIM. PROC. art. 46.05(k) ("If, on the basis of any reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, ***and any evidence introduced in the final competency hearing***, ... ") (emphasis added). This Court has already determined that Counsel has raised a substantial doubt about Mr. Panetti's competency to be executed. The Court has appointed at least two mental health experts. After providing Mr. Panetti with appointed counsel and his own mental health expert and investigator, the Court must hold a "final competency hearing."

Proposed orders are attached for the Court's convenience. [Omitted In Printing]

Respectfully submitted,

/s/ Michael C. Gross
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State Bar No. 08534480
106 South St. Mary's Street, Suite 260
San Antonio, Texas 78205
(210) 354-1919
(210) 354-1920 (Fax)

Attorney for the Defendant,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

CAUSE NO. 3310

THE STATE OF TEXAS	X	**IN THE DISTRICT COURT**
VS.	X	
SCOTT LOUIS PANETTI	X	**GILLESPIE COUNTY, TEXAS**
	X	**216TH JUDICIAL DISTRICT**

ORDER REGARDING

COMPETENCY TO BE EXECUTED

(Signed May 26, 2004)

(File Stamped June 3, 2004)

Pursuant to Article 46.05 of the Texas Code of Criminal Procedure, this Court appointed Mary Anderson, M.D. and George Parker, Ph.D., to conduct a competency examination.

The two aforesaid experts were appointed by the Court to determine whether or not the Defendant, Scott Louis Panetti, is competent to be executed based on standards set out in Subsection H, Article 46.05 of the Code of Criminal Procedure. Attached to this Order are the findings of Dr. Anderson and Dr. Parker.

It appears from the doctors' reports that the Defendant, Scott Louis Panetti, understands that he is to be executed; that the execution is imminent; and that the Defendant understands the reasons he is being executed.

Based on the aforesaid doctors' reports, the Court finds that the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed.

ORDERED this 26th day of May, 2004

/s/ Stephen B. Ables
STEPHEN B. ABLES
Judge Presiding

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SCOTT LOUIS PANETTI,	§	
	§	
P	§	
	§	
V.	§	**CIVIL CASE**
	§	**NO. A-04-CA-042-SS**
DOUG DRETKE, D	§	
T D C	§	
J I D	§	
	§	
R	§	

SECOND MOTION TO RECONSIDER

(File Stamped Feb. 4, 2004)

On January 30, 2004, this Court urged Counsel for Petitioner Scott Louis Panetti to provide some factual allegations concerning Mr. Panetti's current competency to be executed. *Panetti v. Dretke,* No. A-04-CA-042-SS (W.D. Tex. Jan. 30, 2004), slip op. at 5. Since that time, Counsel himself has visited Mr. Panetti and secured the pro bono services of Dr. Mark D. Cunningham, a psychologist, who also spoke with Mr. Panetti. In addition, Counsel has attached the declaration of David R. Dow, a law professor and lawyer, who accompanied Dr. Cunningham on his interview with Mr. Panetti. Accordingly, Counsel can now provide this Court with compelling evidence in support of his claim that Mr. Panetti is not currently competent to be executed under *Ford v. Wainwright,* 477 U.S. 399 (1986). In light of this new evidence, Counsel asks this Court to reconsider its earlier decision. The recent information about Mr. Panetti's mental state entitles him to a stay of execution and funds for Counsel to hire Dr. Cunningham to conduct a thorough mental health evaluation of Mr.

Panetti. Counsel must have a full and fair opportunity to develop the facts of the *Ford* claim before this Court can make a reliable determination of Mr. Panetti's competency to be executed.[1]

I. Counsel's recent visit with Scott Panetti

On February 2, 2004, Counsel visited Scott Panetti for over an hour on death row at the Polunsky Unit in Livingston, Texas. Mr. Panetti does not understand the reasons he is to be put to death on Thursday. ***He believes that he is being executed because of a conspiracy to prevent him front preaching the gospel.*** Scott told me that he is still able to preach the gospel even in the face of this conspiracy. He said that the Devil would chuckle about his death, but that he would triumph with the Lord over the Devil. Scott told me how some inmates began yelling to the guards about his preaching the gospel, but that this incident was further evidence of the Devil's efforts to stop him from evangelizing. In sum, I do not believe that Scott Panetti is competent to be executed.

Scott brought a small bible with him to the visitation area. It was well-worn and tabulated. I asked him which translation of the bible he uses. He told me that he prefers the King James version. Scott then talked about the Revised King James version before discussing other translations of the bible. He jumped from this topic to telling me that he was being persecuted for preaching the

---

[1] In an attempt to exhaust these new facts, Counsel has simultaneously provided the state trial court with the same evidence of Mr. Panetti's current mental status in a renewed motion to determine competency under Article 46.05 of the Texas Code of Criminal Procedure.

gospel. He described how prison guards had placed him handcuffed in a room filled with inmates. He said that the guards had allowed the inmates to beat him, but that the Holy Spirit had allowed him to free himself from the handcuffs and defend himself.

I asked Scott if he had received the legal documents I had sent him over the last few months. He said that he had received the documents but that he did not understand them because he is not a lawyer. Scott then told me that he no longer has the documents. He said that, immediately after he reads a page of any legal document, he destroys that page, reads the next page and then destroys it until nothing remains of the original document. Scott told me that he fears a conspiracy will persecute him if he has any legal documents in his possession. He then began talking about being persecuted for preaching the gospel.

Scott's entire conversation with me was characterized by rambling, incoherent, bizarre, and religiously-preoccupied thinking. His gaze was intense and piercing as he spoke in a rapid-fire manner, jumping from one unrelated, irrelevant topic to the next. For example, at one point as Scott was talking about another conspiracy against him, he noticed my Marine Corps ring and suddenly began talking about life in the military service. He then spoke about preaching the gospel in the service. He talked non-stop. Throughout the interview, I had to interrupt him to, make a statement or ask a question. My attempts to keep him focused on a particular subject were unsuccessful.

Simply put, Scott is a seriously mentally ill man who has absolutely no rational understanding of the connection between his crime and why he is to be executed.

II. Dr. Mark D. Cunningham's preliminary evaluation of Scott Panetti

Dr. Mark D. Cunningham, a clinical and forensic psychologist, agreed to assist Counsel pro bono and conduct a preliminary mental health evaluation of Mr. Panetti. On February 3, 2004, Dr. Cunningham interviewed Mr. Panetti for over an hour-and-a-half on death row at the Polunsky Unit. Dr. Cunningham prepared a brief report of his impressions for Counsel. It is attached as Exhibit 1 to this motion.[2]

Dr. Cunningham found that Mr. Panetti's thought processes are "markedly disorganized, so that it is impossible for him to maintain a linear and logical train of thought." Cunningham Report at 1. He said that Mr. Panetti exhibits "flight of ideas (spontaneously shifting in conversation from one topic to another with no obvious connection; tangentiality (using any inquiry as a starting point to expand into other subjects); and circumstantiality (providing excessive and irrelevant detail)." *Id.* Moreover, Dr. Cunningham found that:

> Mr. Panetti exhibited delusional beliefs incorporating both grandiosity and paranoia. He expressed a conviction that he is the target of evil forces that would seek to prevent him from preaching the gospel. He described that the Satanic forces arrayed against him included not only the Wicken [sic] national headquarters in Wisconsin, but also reached even into "the administration." ***Mr. Panetti attributed the primary reason for his execution to the efforts***

[2] For the Court's convenience, Dr. Cunningham's curriculum vitae is attached to this motion as Exhibit 2.

of these evil forces to prevent him from continuing to preach the gospel.

Id. at 1 (emphasis added).

Dr. Cunningham diagnosed Mr. Panetti as "actively psychotic" and "suffer[ing] from a disorder on the Schizophrenic and/or Schizoaffective spectrum." *Id.* at 2. He concluded that Mr. Panetti is not malingering. *Id.*

III. Professor David R. Dow's recent conversation with Scott Panetti

On February 3, 2004, David Dow, a law professor at the University of Houston Law Center who has handled numerous death penalty appeals over the last fifteen years, accompanied Dr. Cunningham on his interview with Scott Panetti. Professor Dow provided Counsel with a declaration about his visit. It is attached to this motion as Exhibit 3.

Like Counsel and Dr. Cunningham, Professor Dow found Mr. Panetti's speech "rambling and disorganized" as he "bounced wildly from topic to topic." Declaration of David R. Dow. According to Professor Dow, Mr. Panetti "freely associated, quoted random and irrelevant biblical passages, and had to be asked the same question numerous times before he could provide a semblance of an answer." *Id.* Professor Dow stated that Mr. Panetti "clearly suffers from delusions" which affect his ability to establish a rational connection between his crime and his punishment: ***"At least six times during the interview, when asked why he was going to be executed, Mr. Panetti responded that evil forces wanted to stop him from preaching the gospels of Jesus Christ".*** *Id.* (emphasis

added). Mr. Panetti believes that "anti-Christian forces" and the "Devil" have been trying to "eliminate" him since his conception, and that these evil forces even "poisoned his mother's breast milk." *Id.* Professor Dow stated that "Mr. Panetti believes that the murder of his mother-in-law and father-in-law was 'a side issue' concocted to justify killing him, so as to end his spreading of the message of Jesus." *Id.* Professor Dow concluded his declaration by stating that, "In more than fifteen years of representing death row inmates, I do not believe I have met anyone who is as obviously and as deeply mentally disturbed as Mr. Panetti clearly is." *Id.*

PRAYER FOR RELIEF

One of the primary justifications for the death penalty is its retributive force. Justice Powell said in *Ford*, "If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied." 477 U.S. at 422 (Powell, J., concurring). Scott Panetti clearly suffers from a severe mental illness that prevents him from rationally understanding the connection between his crime and his punishment. Executing him will not achieve the critical retributive goal of the death penalty. Accordingly, this Court should:

1. Find Mr. Panetti incompetent to be executed and stay his execution scheduled for February 5, 2004, until he becomes competent to be executed;

   or, in the alternative,

2. Stay Mr. Panetti's execution to allow the parties a full and fair opportunity to develop and present reliable evidence about Mr. Panetti's current competency;

3. Appoint and compensate Undersigned Counsel to represent Mr. Panetti in these competency proceedings;

4. Authorize payment of funds for Counsel to retain Dr. Mark D. Cunningham to conduct a complete and thorough mental health evaluation of Mr. Panetti to determine whether he is competent to be executed;

5. Grant Counsel leave to conduct discovery, including the right to obtain Mr. Panetti's medical records from the Texas Department of Criminal Justice, subpoena witnesses, and take depositions essential to the reliable resolution of his *Ford* claim;

6. Hold an evidentiary hearing to resolve any disputed issues of fact about Mr. Panneti's present competency to be executed; and

7. Grant such other relief as law and justice require.

Respectfully submitted,

/s/ Andrea Keilen
TX ID 24036038
with express permission of
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Counsel for the Petitioner,
SCOTT LOUIS PANETTI

[Certificate Of Service Omitted In Printing]

EXHIBIT 1

MARK D. CUNNINGHAM, PH.D., ABPP
Clinical & Forensic Psychology
Board Certified in Forensic Psychology – American Board of Professional Psychology
417 Oak Bend, Suite 260 Lewisville, Texas 75067
972-459-0658 Fax 972-459-0958

02-03-04

Mr. Michael C. Gross, Esq.
Attorney at Law
106 South St. Mary's Street, Suite 260
San Antonio, Texas 78205

Re: Scott Louis Panetti

Dear Mr. Gross:

Please allow me to summarize my concerns regarding the mental status of your client, Mr. Scott Panetti. In my preliminary evaluation of Mr. Panetti today, I interviewed him for 85 minutes at the Polunsky Unit of TDCJ. I subsequently interviewed his older brother Thomas Panetti and sister-in-law Marcia Panetti. I have also reviewed the affidavits of Wolfgang Selck, M.D., Scott Monroe, Esq. (standby trial counsel), and F.E. Seale, M.D., as well as correspondence of Michael R. Arambula, M.D., R.Ph.

1. Mr. Panetti's thought processes are markedly disorganized, so that it is impossible for him to maintain a linear and logical train of thought. More specifically, he exhibits flight of ideas (spontaneously shifting in conversation from one topic to another with no obvious connection), tangentiality (using any inquiry as a starting point to expand into other subjects), and circumstantiality (providing excessive and irrelevant detail). His responses to

inquiry were repeatedly irrelevant, and he had to be continually interrupted and redirected. Often he answered in ways that seemed satisfactory to him, but in fact had not addressed the inquiry at all or only in the most oblique fashion.

2. Mr. Panetti exhibited delusional beliefs incorporating both grandiosity and paranoia. He expressed a conviction that he is the target of evil forces that would seek to prevent him from preaching the gospel. He described that the Satanic forces arrayed against him included not only the Wicken national headquarters in Wisconsin, but also reached even into "the administration." Mr. Panetti attributed the primary reason for his execution to the efforts of these evil forces to prevent him from continuing to preach the gospel.

3. Mr. Panetti expressed the belief that God may render him invulnerable to lethal injection so that he may go on preaching the gospel.

4. Mr. Panetti reported that he promptly tears up and flushes any legal correspondence or documents regarding his case, as these are "classified documents" and he fears they may fall into "enemy hands."

5. He has no insight into his psychotic thought processes or continuing mental illness, describing that he is a "born again April fool" who God has healed from Schizophrenia and any associated need for medication or treatment.

My diagnostic impression is that Mr. Panetti is actively psychotic, and suffers from a disorder on the Schizophrenic and/or Schizoaffective spectrum.

There is virtually no possibility that Mr. Panetti is malingering his current symptoms. First, the disorganization of thought that he exhibited is extraordinarily difficult to imitate or manufacture. Second, he has a history of psychotic decompensation and inpatient psychiatric treatment that predates his capital offense. Third, my observations are consistent with Mr. Panetti's presentation in the 1997 evaluation performed by Dr. Aramula. Fourth, Mr. Panetti's family described his longstanding thought disorganization.

Please advise me if I can provide additional information or assistance.

Sincerely,

/s/ Mark D. Cunningham
Mark D. Cunningham, Ph.D., ABPP

EXHIBIT 3

DECLARATION OF DAVID R. DOW

My name is David R. Dow. I am a professor of Law at the University of Houston Law Center. In addition to writing scholarly articles and teaching in the areas of constitutional law and death penalty jurisprudence. I have handled, as lead lawyer or co-counsel, more than thirty death penalty appeals since 1988.

On Tuesday, February 3, 2004, I accompanied Dr. Mark D. Cunningham, a clinical and forensic psychologist, for an interview of Scott Panetti in the death row visitation area of the Polunsky Unit of the Texas Department of Criminal Justice.

During the approximately 1.5 hour meeting, it was immediately obvious to me that Mr. Panetti is severely mentally ill. Mr. Panetti's discourse was rambling and disorganized. He was unable to answer simple questions in a linear fashion, and he bounced wildly from topic to topic. He was unable to remain focused on the questions put to him. He freely associated, quoted random and irrelevant biblical passages, and had to be asked the same question numerous times before he could provide a semblance of an answer.

Mr. Panetti clearly suffers from delusions. At least six times during the interview, when asked why he was going to be executed, Mr. Panetti responded that evil forces wanted to stop him from preaching the gospels of Jesus Christ. He stated that "the anti-Christian forces outnumber us," and those forces were attempting to "rub him out."

He stated that since his conception in 1958, the Devil has been trying to eliminate him. He believes that evil forces poisoned his mother's breast milk.

He reported matter-of-factly that when prison officials or other death row inmates have attempted to throw boiling water on him, Jesus has cooled the water before it touched his skin. He similarly reported that when other inmates have shot him with darts from a blowgun, he has not shed any blood.

Mr. Panetti believes that the murder of his mother-in-law and father-in-law was "a side issue" concocted to justify killing him, so as to end his spreading of the message of Jesus. He believes that an alter ego, "Sergeant Iron Horse," carried out the murders.

In more than fifteen years of representing death row inmates, I do not believe I have met anyone who is as

obviously and as deeply mentally disturbed as Mr. Panetti clearly is.

I declare under penalty of perjury under the laws of the State of Texas and the United States of America that the foregoing is true and correct. Executed this 3d day of February, 2004.

/s/ David R. Dow
David R. Dow

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SCOTT LOUIS PANETTI,
Ph

-v

DOUG DRETKE, D
TDp
fCh
IDp
Rp

CNoA-04-CA-042-SS

ORDER

(Filed Feb. 4, 2004)

Before this Court is Petitioner's Second Motion to Reconsider [#10], filed today February 4, 2004. Attached to this motion is a mental health evaluation of Scott Panetti, conducted by Mark D. Cunningham, Ph.D., ABPP, and the sworn declaration of Professor David R. Dow, a law professor who accompanied Dr. Cunningham and observed his evaluation of Panetti. *See* Sec. Mot. to Reconsider Ex. 1 & Ex. 3. On January 30, 2004, the Court entered an Order in which it explained:

> As the Court already explained, the state court held Panetti failed to set forth alleged facts or make a sufficient documentary showing in support his assertion that he is presently incompetent to be executed and therefore failed to make a substantial showing as is required by Article 46.05(6) [of the Texas Code of Criminal Procedure]. The Court has reviewed the Article 46.05 application and record submitted to the state court that are attached to Panetti's motion

for reconsideration. In his application, Panetti outlined his mental health history for the time period from 1981 until 1997. *See* State Court Record, attached to Mot. to Reconsider at 26-34. Therefore, just as with the instant habeas petition pending before this Court, there was no evidence (or allegations) before the state court regarding Panetti's competency *at this time.* Panetti contends the record is devoid of such allegations and evidence because Panetti is indigent and cannot afford a mental health evaluation. He contends that it was an unreasonable application of the Supreme Court's decision in *Ford* for the Texas Court to deny a mental health evaluation in this case. But as the Court explained two days ago, the Fifth Circuit declared the Article 46.05 procedures constitutionally adequate under *Ford* in *Caldwell v. Johnson,* 226 F.3d 367, 374 (5th Cir. 2000). And those procedures require a petitioner to raise a substantial doubt of the defendant's competency to be executed BEFORE a mental health expert will be appointed. *See* Tex. Code of Crim. Pro. Article 46.05. This requirement is consistent with *Ford. Ford,* 477 U.S. at 425-426 (Powell, J. concurring) (stating in his concurring opinion in support of his decisive fifth-vote that the state "may properly presume that petitioner remains sane at the time sentence is to be carried out and may require a substantial threshold showing of insanity merely to trigger the hearing process."). The Court cannot hold that it was unreasonable for the state court to deny Panetti's Article 46.05 motion in light of the allegations and evidence that were presented to it since they wholly fail to address whether or not Panetti knows of his impending execution and the reason for it, the definition of sanity-to-be executed promulgated not only by the Fifth

> Circuit and Texas law, but by the decisive Powell concurrence in *Ford,* a plurality opinion. *See Ford,* 477 U.S. at 422 (Powell, J., concurring) ("I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it."). And neither has Panetti or his counsel presented to this Court any *factual allegations* regarding Panetti's *current* competency, let alone the affidavit of a prison doctor, guard or even Panetti's counsel attesting to his current incompetency. As such, the Court must deny the second motion to stay execution.

Jan. 30, 2004 Order at 4-5. However, Panetti has now presented evidence to support his contention that he is incompetent to be executed at this time in the form of Dr. Cunningham's findings and Professor Dow's observations that Panetti is delusional and misunderstands whether and why he will be executed. *See* Sec. Mot. to Reconsider at Ex. 1 & Ex. 3. Additionally, Panetti represents that he has presented this same evidence to the state court in a renewed motion to determine his competency under Article 46.05 of the Texas Code of Criminal Procedure. *See* Sec. Mot. to Reconsider at 2 n.2.

As this Court has now explained in each of its previous orders in this case, this Court can only review the state court's decision denying Panetti's competency-to-be-executed claim to ascertain whether the decision was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Therefore, it is appropriate that Panetti

present his new evidence to the state court first because at this point, this Court is limited to reviewing the reasonableness of the state court's denial of Panetti's Article 46.05 motion based on the evidence it had before it at that time the state court denied that motion in December. However, because the execution is scheduled for tomorrow, the Court will stay the execution and allow the state court a reasonable period of time to consider the evidence of Panetti's current mental state and decide whether he has now "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency that entitles him to a mental health evaluation by at least two mental health experts under Article 46.05. TEX. CODE. CRIM. P. Art. 46.05.

In accordance with the foregoing:

IT IS ORDERED that Petitioner's Second Motion to Reconsider [#10] is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion to Stay [his scheduled February 5, 2004] Execution is GRANTED and his execution is **STAYED for sixty (60) days** to allow the state court to reconsider his motion under Article 46.05 of the Texas Code of Criminal Procedure challenging his competency-to-be-executed in light of the evidence of Panetti's current incompetency to be submitted to this and the state court.

SIGNED this the 4th day of February 2004.

/s/ Sam Parks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SCOTT LOUIS PANETTI,

Petitioner,

-vs-

DOUG DRETKE, Director, Texas Department of Criminal Justice, Institutional Division, **Case No. A-04-CA-042-SS**

Respondent.

ORDER

(Filed July 20, 2004)

BE IT REMEMBERED on the 19th day of July 2004 the Court called the above-styled cause for a hearing on all pending matters and to show cause why the case should not be dismissed on mootness or ripeness grounds, and why it should not be set for an evidentiary hearing in this Court. The parties appeared through counsel. Before the Court were Respondent's Motion to Dismiss Petition [#4], Petitioner's Motion for Appointment of Counsel [#16]. Petitioner's Motion for Authorization of Funds for Expert and Investigative Assistance, Statement of the Need For Confidentiality, and Motion for Leave to File Ex Parte Application for Funds Under Seal [#17], Petitioner's Motion for Discovery [#18], Petioner's Sealed Ex Parte Motion for Authorization of Funds for Expert Assistance [#19], and Petitioner's Sealed Ex Parte Motion for Authorization of Funds for Investigative Assistance [#20]. Having considered the motions, the arguments of counsel

at the hearing, the relevant law, and the case file as a whole, the Court now enters the following opinion and orders.

Background

The petitioner, Scott Panetti, filed his second application[1] for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on January 26, 2004, after his execution date had been set and he had exhausted the available state court procedures, alleging he was incompetent to be executed. Panetti's attorney had filed a motion under Article 46.05 of the Texas Code of Criminal Procedure ("Article 46.05") in state court on December 9, 2003. On December 23, 2003, the state district judge, after considering the exhibits attached to the motion, denied Panetti's motion on the grounds:

> [T]he Defendant has failed to set forth alleged facts in support of the assertion that the Defendant is presently incompetent to be executed and has failed to make a substantial showing that the defendant is thus incompetent. The court further finds that the Defendant has failed to raise a substantial doubt of the defendant's competency to be executed on the basis of the said motion and attached documents, as required by Article 46.05(6), Tex. Code Crim. Proc.

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[1] Panetti filed his first federal habeas petition in 1999, in which he alleged fourteen grounds for relief, including claims that he was incompetent to waive counsel and incompetent to stand trial, but not that he was incompetent to be executed. *See Panetti v. Johnson*, Cause No. A:99-CA-260-SS (W.D. Tex. Mar. 9, 2001). This Court's opinion was affirmed on appeal. *See Panetti v. Cockrell*, No. 01-50347, slip. op. at 6-8 (5th Cir. Jun. 19, 2003).

Panetti filed a motion for stay of execution in this Court in conjunction with his habeas application, arguing this finding is a decision contrary to clearly established Supreme Court precedent, and specifically, *Ford v. Wainright*, 477 U.S. 399 (1966). The issue before this Court in deciding that initial motion to stay was whether reasonable jurists could disagree regarding whether the state court's decision that Panetti had not made a substantial showing of incompetency that would warrant evaluation of two mental health experts was an unreasonable application of *Ford* and its progeny. Initially, however, Panetti and his attorney had failed to include with their motion to stay or federal habeas application the Article 46.05 motion filed in the state court or any evidence of the Panetti's current mental status. Counsel for Panetti did submit a copy of the Article 46.05 application with his first motion for reconsideration. Eventually, along with a second motion for reconsideration, Panetti presented evidence to support his contention that he is incompetent to be executed at that time in the form of Dr. Cunningham's findings and Professor Dow's observations that Panetti is delusional and misunderstands whether and why he will be executed. Panetti told the Court that he had presented this same evidence to the state court in a renewed motion to determine his competency under Article 46.05. Therefore, the Court held it appropriate that Panetti present his new evidence to the state court first because at that point, the Court was limited by AEDPA to reviewing the reasonableness of the state court's denial of Panetti's Article 46.05 motion based on the evidence it had before it at that time the slate court denied that motion in December 2003. However, because the execution was scheduled for the following day, February 5, 2004, the Court stayed the execution for 60 days to allow the state court a reasonable

period of time to consider the evidence of Panetti's current mental state and decide whether he has now "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency that entitles him to a mental health evaluation by at least two mental health expects under Article 46.05. TEX. CODE CRIM. P. Art. 46.05.

After the Court's February 4, 2004 Order, the state court judge, Judge Ables, asked the parties to recommend mental health experts. On February 19, 2004, Panetti's counsel filed ten motions in state court, asking for several things including that counsel be appointed, funds to hire experts, discovery, and that the state refrain from setting a new execution date, among other requests. On February 20, 2004, Panetti's lawyer gave Judge Ables a mental health expert's name. However, the trial judge had decided to use two mental health experts he selected instead of those recommended by the parties. On February 23, 2004, Judge Ables entered an order citing Article 46.05(f) appointing psychiatrist Mary Anderson and clinical psychologist George Parker to examine Panetti. Counsel for Panetti contends that by appointing those experts, Judge Ables implicitly found Panetti had made "a substantial showing of incompetency" with the documentary evidence he had submitted. On April 28, 2004, the appointed experts filed their joint report concluding Panetti was competent to be executed. Counsel for Panetti was then order [sic] to raise any other matters regarding competency by May 21, 2004. On May 21, 2004, Panetti filed objections to the methods and conclusions of the experts and renewed his motions to appoint counsel, hire a mental health expert, and to hire an investigator. He also asked the trial court to hold an evidentiary hearing, which

counsel for Panetti maintains is required by the plain language of Article 46.05. On May 26, 2004, Judge Ables entered a short order in which he stated he had appointed two experts pursuant to Article 46.05 and that it "appears from the doctors' reports that the Defendant, Scott Louis Panetti, understands that he is to be executed; that the execution is imminent, and that the Defendant understands the reasons he is being executed." Respondent's Opp. to Mot. for Funds, Ex. A (May 26, 2004 Ables Order). Thus, concluded Judge Ables, "[b]ased on the aforesaid doctors' reports, the Court finds the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *Id.*

At approximately the same time Judge Ables issued his order denying Panetti's motion under Article 46.05, this Court entered a show cause order instructing Panetti to show cause why his case should not be dismissed as moot. Panetti responded by filing motions for appointment of counsel, for authorization of funds for expert and investigative assistance, and for discovery. The Court set the case for hearing on these motions, as well as the motion to dismiss filed in January by the Respondent, and so that the parties could present their arguments regarding whether Panetti's *Ford* claim faced any mootness or ripeness problems in light of the fact there is currently no pending execution date.

Analysis

I. Preliminary Issues: Ripeness and Successive Petitions

At the time he filed it, Panetti's petition was definitely ripe for review as he was facing a February 5, 2004 execution. *See Stewart v. Martinez-Villareal,* 523 U.S. 637, 643

(1998) (declaring a petitioner's *Ford* claim "unquestionably ripe" once the state supreme court issued a warrant for his execution). Then this Court stayed the execution for 60 days so that the state court could consider the evidence of Panetti's competency to be executed presented to this Court in conjunction with his motions to stay. The state court did review the evidence and ultimately denied Panetti's Article 46.05 motion. However, the district attorney has not yet filed his motion to secure a new execution date. The parties at the hearing represent that both consider Panetti's execution imminent – the district attorney is simply refraining from requesting a date until these proceedings are concluded so the Court is not again faced with emergency motions to stay. An imminent execution is the prerequisite to a ripe *Ford* claim. *Id.* at 644-45 (stating a petitioner's competency to be executed cannot be determined until his execution is imminent). The parties agree Panetti's execution is indeed imminent and therefore the Court holds Panetti's *Ford* claim is ripe for review.

Respondent contends this Court should dismiss this petition as successive or transfer it to the Fifth Circuit so that Panetti can secure the leave of the Fifth Circuit to pursue his successive petition. On April 24, 1996, significant amendments were made to the habeas corpus statute by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). 28 U.S.C. § 2244(b) was amended to provide that before a second or successive application for writ of habeas corpus is filed in the district court, an applicant must move in the appropriate court of appeals for an order authorizing the district court to consider the application. *See* 28 U.S.C. § 2244(b)(3).

AEDPA's limitations on successive applications for writs of habeas corpus present a thorny problem for petitioners with *Ford* claims in light of *Martinez-Villareal*. On the one hand, under *Martinez-Villareal*, a *Ford* claim is not ripe until the petitioner's execution is set, or at least imminent. Therefore, it would be futile to raise the *Ford* claim in a initial application for federal habeas relief because it would inevitably be dismissed as premature. *See Martinez-Villareal,* 523 U.S. at 644-45 (acknowledging the propriety of dismissing a *Ford* claim as premature prior to the scheduling of the execution); *see also In re Davis,* 121 F.3d 952, 953 (5th Cir. 1997) (explaining in the procedural history "Our court denied the motion without prejudice as premature, because Davis' execution had not been scheduled."). On the other hand, if a petitioner does not raise a *Ford* claim in his initial petition, and instead waits until it is ripe (i.e., his execution date is set), pursues the available state remedies under Article 46.05, and then seeks federal habeas review, he faces potential dismissal of his petition under AEDPA since the claim was not presented in an earlier petition and is based on neither a new rule of constitutional law (*Ford* was decided in 1986) nor a factual predicate that could not have been discovered based on the exercise of due diligence (Panetti's history of mental illness predates his first habeas petition). *See* 28 U.S.C. § 2244(b)(2). It is, however, based on a factual predicate that did not exist at the time he filed his first petition – the setting of his execution date.

The Fifth Circuit in *Davis,* prior to *Martinez-Villareal,* applied § 2244(b)(2) to a situation like this one, where the petitioner did not raise a *Ford* claim in his first petition but did raise it in a successive petition once his execution date had been set. Acting without the Supreme Court's

guidance in *Martinez-Villareal* that a *Ford* claim is not ripe until an execution is imminent, the Fifth Circuit concluded § 2244(b)(2)(A) did not apply to the petitioner's claim because the legal basis of his claim had been available since the year *Ford* was decided (1986) and it was only the factual basis that was not available. *Davis,* 121 F.3d at 956. The Fifth Circuit also declined to create an equitable exception to § 2244(b) for those petitioners who present their *Ford* claims at the first available opportunity *(i.e.,* once his execution date was set) even though the appellate court was willing to accept that the petitioner was not abusing the writ since he was acting at the first available opportunity. *Id.* Finally, the Fifth Circuit rejected the petitioner's argument § 2244(b) is unconstitutional in the context of *Ford* claims since it precludes consideration by a federal court of a mature *Ford* claim presented for the first time on the gounds federal court review can be obtained through United States Supreme Court review of state court competency proceedings or by the petitioner's filing an original habeas application to the United States Supreme Court. *Id.* (citing U.S. CONST. Art. I, § 9, cl.2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless, when in Cases of Rebellion or Invasion the public Safety may require it")).

The Fifth Circuit acknowledged "the uneasy fit" of *Ford* claims and successive writs post *Martinez-Villareal* in *Richardson v. Johnson,* 256 F.3d 257 (5th Cir. 2001) but explicitly avoided the question presented in this case. In *Richardson,* the petitioner, like Panetti, raised his *Ford* claim for the first time in a second petition once his execution date was set. *Id.* at 258. The district court denied relief but granted his application for certificate of appealability on the

question of whether *Martinez-Villareal* overruled *Davis*. In *Richardson*, the Fifth Circuit made clear that there was no question the petitioner was pursuing a successive writ. *Id.* However, the Circuit noted that the question of whether a *Ford* claim is subject to the limits of a successive writ is a "distinct question." and also noted the supreme court in *Martinez-Villareal* explicitly declined to decide the case of a petitioner who did not present his *Ford* claim in his first federal habeas (because petitioner Martinez-Villareal had). *Id.* at 258-59. Thus, the Circuit framed the issue this way:

> This leaves the argument that Richardson did not have a *Ford* claim at the time he filed his first federal habeas, a contention with two aspects. The first is that the factual basis for the *Ford* claim could not have been discovered at the time of the first federal habeas. That claim is refuted by the assertion he has long suffered this bipolar disorder and by his own expert witness.
>
> The second aspect is that the *Ford* claim was not ripe when the first federal habeas petition was filed for the reason that the execution was not then imminent. To accept this argument would mean as a practical matter that no *Ford* claim would need to be presented in a first filed habeas, given that the state courts, in part at our urging, now seldom set execution dates until after the first round of appeals and habeas.

Id. at 259. The Fifth Circuit then concluded it "need not wrestle" with the issue of whether an unripe *Ford* claim needs to be presented in a first filed habeas petition because in *Richardson*, it was clear based on the findings of fact of the state courts that his *Ford* claim had no merit. *Id.* In spite of avoiding this significant question, however, the Fifth Circuit nevertheless held that while "*Ford* claims

admittedly have an uneasy fit with AEDPA's limits upon successive writs," that fit was examined in *Davis* and *Davis* remains "sound and binding." *Id.*

This Court is thus in a difficult position because in the Fifth Circuit in *Richardson* avoided the exact question presented in this case and without explanation, held *Davis* remains good law even though in light of *Martinez-Villareal,* Panetti's *Ford* claim was clearly not ripe until his execution date was set. To further complicate matters, the Texas appellate courts have abdicated all responsibility with regard to *Ford* claims. In *Ex Parte Caldwell,* 58 S.W.3d 127, 330 (Tex. Crim. App. 2000), the Texas Court of Criminal Appeals held Article 46.05 "provides that jurisdiction of the motion remains in the trial court and permits the Court of Criminal Appeals to review only a finding of incompetence. Under the statute, we have no other role in the process." The impact of *Ex Parte Caldwell,* besides the obvious problem that Article 46.05 will never be subject to clarification by the appellate courts of Texas, is a petitioner seeking relief through Article 46.05 cannot appeal a state court's denial of his *Ford* claim to the United States Supreme Court even on federal constitutional grounds, since the Texas Court of Criminal Appeals cut off his right to appellate review to the Texas appellate courts on a purely state law basis. This in turn undermines the rationale of *Davis,* which in part concluded that § 2244(b) was not unconstitutional as applied to *Ford* claims because "federal court determination of the issue can be sought through Supreme Court review of the state court competency proceedings." *Davis,* 121 F.3d at 956. In Texas this is clearly not the case.

Thus, if Panetti cannot bring his *Ford* claim in an initial petition because it is not ripe, and cannot bring it in

a second petition once his execution date is set under § 2244(b) and the rationale of *Davis*, then he cannot secure federal review of his *Ford* claim at all in Texas except to filed [sic] an original habeas application in the United States Supreme Court. The Fifth Circuit in *Richardson* recognized even after *Davis* that it may be that petitioners such as Panetti do not have ripe *Ford* claim when they file their first federal habeas petitions and therefore as a practical matter, no *Ford* claim needs to be presented in a first filed habeas. *Richardson*, 256 F.3d at 259. Although the Fifth Circuit avoided "wrestling" with this question, this Court, squarely presented with it, cannot. Therefore, in light of the fact the rationale of *Davis* is called into question by the combination of the Supreme Court's decision *Martinez-Villareal* and the Texas Court of Criminal Appeals' decision in *Ex Parte Caldwell*, and the question left often by the Fifth Circuit in *Richardson*, the Court concludes Panetti had no *Ford* claim until his execution date was set. Therefore, it would have been futile to require him to assert it in his first petition, and the ripe claim is now properly before this Court. Accordingly, the Respondent's motion to dismiss this petition as successive is denied.

II. The State Court Decision

The Court now turns to the merits of Panetti's *Ford* claim.[2] Of course, this Court can only grant Panetti's petition if the state trial judge's decision that he competent to be executed is (1) "contrary to, or involved an

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[2] This claim is exhausted because under *Ex parte Caldwell*, discussed above, Panetti has no right to appeal the trial judge's denial of his Article 46.05 motion in the state courts. *See Patterson v. Dretke*, 370 F.3d 480, 483 (5th Cir. 2004).

unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *see also Brown v. Cain*, 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied*, 520 U.S. 1195 (1997).

As the Court explained its prevision Orders in this case, in *Ford,* the Supreme Court in a plurality opinion declared the execution of the insane a violation of the Eighth Amendment prohibition of cruel and unusual punishment. 477 U.S. at 409-410. According to the Fifth Circuit's interpretation of *Ford*, a state does not run afoul of the Eighth Amendment if it ensures "that a person know the fact of his impending execution and the reason for it," *Fearance v. Scott*, 56 F.3d 633, 640 (5th Cir. 1995). In 1999, Texas enacted Article 46.05, which codifies this definition of insanity and sets forth the procedures by which the state courts should evaluate a petitioner's competency-to-be-executed claim. *See* TEX. CODE CRIM. PROC. Art. 46.05. In relevant part, Article 46.05 directs the state court:

> (d) On receipt of a motion filed under this article, the trial court shall determine whether the defendant has raised a substantial doubt of the defendant's competency to be executed on the basis of:
>
> > (1) the motion, any attached documents, and any responsive pleadings; and
> >
> > (2) if applicable, the presumption of competency under Subsection (e).

(e) If a defendant is determined to have previously filed a motion under this article, and has previously been determined to be competent to be executed, the previous adjudication creates a presumption of competency and the defendant is not entitled to a hearing on the subsequent motion filed under this article, unless the defendant makes a prima facie showing of a substantial change in circumstances sufficient to raise a significant question as to the defendant's competency to be executed at the time of filing the subsequent motion under this article.

(f) If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed.

(g) If the trial court does not determine that the defendant has made a substantial showing of incompetency, the court shall deny the motion.

(h) A defendant is incompetent to be executed if the defendant does not understand:

(1) that he or she is to be executed and that the execution is imminent; and

(2) the reason he or she is being executed.

(i) Mental health experts who examine a defendant under this article shall provide within a time ordered by the trial court copies of their reports to the attorney representing the state, the attorney representing the defendant, and the court.

> (j) By filing a motion under this article, the defendant waives any claim of privilege with respect to, and consents to the release of, all mental health and medical records relevant to whether the defendant is incompetent to be executed.
>
> (k) If, on the basis of reports provided under Subsection (i), the motion, any attached documents, any responsive pleadings, and any evidence introduced in the final competency hearing, the trial court makes a finding by a preponderance of the evidence that the defendant is incompetent to be executed, the clerk shall send immediately to the court of criminal appeals in accordance with Section S(d), Article 11.071, the appropriate documents for that court's determination of whether any existing execution date should be withdrawn and a stay of execution issued. If a stay of execution is issued by the court of criminal appeals, the trial court periodically shall order that the defendant be reexamined by mental health experts to determine whether the defendant is no longer incompetent to be executed.
>
> (l) If the trial count does not make the finding as described by Subsection (k), the court may set an execution date as otherwise provided by law.

Id. The Fifth Circuit has declared these procedures in compliance with the mandates of *Ford* and therefore constitutional on their face. *Caldwell v. Johnson,* 226 F.3d 367, 374 (5th Cir. 2000). Therefore, had Judge Ables followed Article 46.05, the reasonableness of his legal conclusions would be insulated from attack on habeas review since it would be impossible for this Court to hold they were "contrary to, or involved an unreasonable

application of, clearly established federal law, as determined by the Supreme Count of the United States." 28 U.S.C. § 2254(d).

However, in this case, Judge Ables deviated from the parameters of Article 46.05. On February 23, 2004, he entered an order citing Article 46.05(f) appointing psychiatrist Mary Anderson and clinical psychologist George Parker to examine Panetti. By citing Article 46.05(f) and appointing the two experts, Judge Ables implicitly found Panetti had made "a substantial showing of incompetency."[3] TEX. CODE CRIM. PROC. art. 46.05(f). Thus, under the plain language of Article 46.05(k), he was then required to consider the mental health experts' reports, Panetti's motion, attached documents, responsive pleadings, and "any evidence introduced in the final competency hearing" before making a determination based on the preponderance of the evidence whether Panetti was competent to be executed. TEX. CODE CRIM. PROC. art. 46.05(k). However, Judge Ables did not hold a "final competency hearing" and therefore did not consider any responsive evidence Panetti might have presented. As such, he did not comply with Article 46.05.

That Judge Ables did not comply with Article 46.05 does not automatically mean Panetti is entitled to relief on his *Ford* claim. It simply means that Judge Ables' conclusion is taken out of the safe harbor created by the Fifth

[3] As the Court explained in detail its previous Orders in this case, states are allowed under *Ford* to require an initial documentary demonstration of incompetency before ordering an [sic] mental health evaluation. With regard to Panetti's most recent Article 46.05 motion, however, Judge Ables implicitly found Panetti met this threshold burden.

Circuit in *Caldwell v. Johnson* that insulates state proceedings conducted in compliance with Article 46.05 from habeas attacks on the grounds they fall short of what *Ford* requires. The next question for this Court is whether what the state trial judge did in this case, albeit inconsistent with what Texas law requires, nevertheless complied with the minimal requirements of *Ford*. *Ford* itself involved a situation where the state (albeit the governor, not a trial court), appointed mental health experts to evaluate the petitioner's competency to be executed. Justice Powell in his critical and decisive concurrence concluded Florida's procedures did not comport with the Constitution's guarantee of due process. Justice Powell emphasized the Florida procedures did not afford the petitioner the "opportunity to be heard" because the Florida statute did not require the governor to consider materials submitted by the prisoner. *Ford*, 477 U.S. at 424. Therefore, concluded Justice Powell:

> [T]he determination of the petitioner's sanity appears to have been made *solely* on the basis of the examinations performed by state-appointed psychiatrists. Such a procedure invites arbitrariness and error by preventing the affected parties from offering contrary medical evidence or even from explaining the inadequacies of the State's examinations. It does not, therefore, comport with due process. It follows that the State's procedure was not "fair," and that the District Court on remand must consider the question of petitioner's competency to be executed.

Id. at 424-425. Justice Powell went on to opine that due process would not require a full-blown trial or anything close. As long as the state provided an impartial entity to "receive evidence and argument from the prisoner's

counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination," it would be affording the petitioner due process. *Id.* at 427. In this case, however, it was exactly this ability to present his own evidence and refute the state-appointed psychiatrists' opinions that Panetti was denied. Had the trial court complied with Article 46.05 and afforded Panetti a final evidentiary hearing, it would have complied with the mandates of *Ford* as well. However, in falling short of the mandates of Article 46.05, Judge Ables fell short of the mandates of *Ford* as well.

Thus, the Court will hold an evidentiary hearing at which Panetti can introduce his own evidence and attempt to rebut the state court-appointed experts' conclusions that he is competent to be executed. In order to ensure his ability to adequately present his claim, the Court will appoint counsel[4] and afford him the funds to obtain investigative and expert assistance. Additionally, the Court will in a separate order address Panetti's motion for discovery.

In accordance with the foregoing:

IT IS ORDERED that Respondent's Motion to Dismiss Petition [#4] is DENIED.

IT IS FURTHER ORDERED that Petitioner's Motion for Appointment of Counsel [#16] is GRANTED.

IT IS FURTHER ORDERED that Petitioner's Motion for Authorization of Funds for Expert and

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[4] The Fifth Circuit recently upheld in the validity of appointing counsel to assist in the investigation of a claim that the petitioner could not have raised in an earlier petition. *See In re: Hearn*, ___ F.3d ___, 2004 WL 1497522 (5th Cir. Jul. 6, 2004).

Investigative Assistance and Motion for Leave to File Ex Parte Application for Funds Under Seal [#17] are GRANTED.

IT IS FURTHER ORDERED that Petitioner's Sealed Ex Parte Motion for Authorization of Funds for Expert Assistance [#19] is GRANTED and Defendant is authorized to retain an expert at the maximum rate of $100 per hour. Defendant may incur up to $1000 of expert services from his expert. If Defendant believes he needs more than $1000 worth of expert services, he must file a motion justifying the same and detailing the expected expense. Defendant is ordered to obtain and file with the Court an itemized accounting from the expert of what services he provided and the amount of time he expended.

IT IS FURTHER ORDERED that Petitioner's Sealed Ex Parte Motion for Authorization of Funds for Investigative Assistance [#20] is GRANTED and Defendant is authorized to retain an investigator at the maximum rate of $50/hour. Defendant may incur $1000 in investigatory services. If Defendant believes he needs more investigation after incurring the expense of $1000, he must file a motion with this Court justifying the same and detailing the expected expense. Defendant is ordered to obtain and file with the Court an itemized accounting from the investigator of what he investigated and the amount of time spent.

IT IS FINALLY ORDERED that this case is SET for EVIDENTIARY HEARING on August 23, 2004 at 9:30 00 a.m. in Courtroom No. 2, United States Courthouse, 200 West Eighth Street, Austin, Texas.

SIGNED this the 20th day of July 2004.

/s/ Sam Sparks
SAM SPARKS
UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SCOTT LOUIS PANETTI	)	Docket NO. A 04-CA-042 SS
	)	
vs.	)	Austin, Texas
	)	
DOUG DRETKE	)	September 7, 2004

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE SAM SPARKS
Volume 1

(Filed Nov. 15, 2004)

[5] MARY ALICE CONROY, called by the Petitioner, duly sworn.

DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Where are you employed?

A. I'm a professor in the Department of Psychology at Sam Houston State University.

Q. And what is your position?

A. I am a professor and I'm also director of practicum training for the forensic clinical psychology doctorate program, and I'm director of in-clinic training.

THE COURT: Excuse me. What school?

THE WITNESS: Sam Houston State University.

* * *

[12] Q. All right. I want to ask you now about Scott Panetti. Did you interview him last August 26th?

A. That's correct. I did.

Q. What was his demeanor towards you at the time?

A. His demeanor was polite and cooperative, but quite suspicious. As the interview began, I gave him a statement of disclosure, which I always do. I go over it with him. He was very suspicious of that. He didn't want to sign it. He gave it back to me but said he would talk, anyway.

And as the interview progressed, he occasionally challenged my motives. For example, he suddenly asked me if I'd attended the prison rodeo in Huntsville, and I said no. And he said, well, then, you're probably biased against me because if you don't understand using working animals for important purposes, you're not in my corner. And then, he went on to talk about rodeo work, and we even got off that topic.

As the interview ended – and he ended it rather abruptly – as he was walking out of the room with the assistant warden, he turned around and said, I don't understand, are you a friend or foe? And I said, pardon me? And he said, are you friend or foe? And, of course, I'd already given him the disclosure with the fact that you had requested my appointment from the federal court.

[13] So I went over that again, and he said, well, I don't know if you work for the darkness or the light.

Q. The darkness or the light?

A. The darkness or the light.

Q. Okay. Did he ask you about you being a Christian?

A. He did.

Q. How did you handle that?

A. I just said, well, Mr. Panetti, I believe many things, as most people do, but I'm interested in hearing what you believe.

Q. Okay. Did that get him somewhat back on track or was he still –

A. He went off in another direction. He didn't challenge my Christianity.

Q. Did he terminate the interview?

A. Yes. The first one, yes.

Q. Is it important to – about how long did you spend with him, would you estimate, the first visit?

A. The first visit was about an hour and 25 minutes, and things at that point seemed to be going all right. And then, suddenly, he waved to the officer and looked at me and said, can I go now? And that was the end of that.

Q. Is it important to spend time with someone like Mr. Panetti?

A. I think it's particularly important to spend time with Mr. [14] Panetti and to listen not only to the content of what he says but how he says it, the order in which he says it, the way in which he puts ideas together.

Q. Okay. And the longer – why is it important to spend an extended period of time, rather than a short

period of time, when you're doing an evaluation of someone like this?

A. Well, this particular type of person – and we'll probably get into this later – I believe to have a severe thought disorder, and that means that his thinking does not fit together in any kind of logical, rational way, and that's something that's very difficult to mock or to copy.

But what you do as an evaluator if you want to see, you know, this really serious thought disorder, or was it something else, you listen to them for a long period of time and you let them talk, and you see if they, in fact, repeat themselves, or if they come up with memorized things, or if this is something that they're – that they've said before. When they run out of steam – and many times, they actually start talking in an irrational manner by about half an hour.

And so, that's why I thought it was very important to let Mr. Panetti talk for a full hour and 20 minutes the first time I saw him.

Q. Okay. And where did you interview him?

A. I interviewed him in a special contact visiting room, off the visiting area at the Polunsky Unit.

[15] Q. Okay. And what did you understand the purpose of your visit to be there?

A. My understanding was I needed to look at the elements of competence for execution as they applied to Mr. Panetti.

Q. Okay. What records did you review in connection with your evaluation of him?

A. All right. Do you mind if I refer to my notes for that?

Q. Not at all.

A. Anyone's welcome to unless –

Q. I know it's voluminous.

A. Ended up actually having rather voluminous records on this person to review. I reviewed all of his TDCJ records. And he'd been in TDCJ since 1995. Reviewed the Bell County jail records; reviewed his general Navy records, and then, the Naval Regional Medical Center records. And then, medical records – I had records from Veterans Administration Medical Centers in Kerrville, Waco and Tomah, Wisconsin; and then, some from Cumberland Memorial Hospital, and from Northern Pines Unified Services Center; and a commitment record which was a legal paper from 1990.

And then, in terms of doctors' reports, I reviewed reports by Dr. Lee Simes, Dr. Mary Anderson, Dr. George Parker, Dr. Mark Cunningham, Dr. Michael Arambula, Dr. F.E. Seale, Dr. Wolfgang Selck. And then, it wasn't a report, but it was a transcript of testimony of Dr. Richard Coons. And [16] then, there were two attorney statements. I believe one –

Q. Dr. Coons, was that from the 1994 competency trial?

A. Yes, that was.

Q. Okay. Go ahead. I'm sorry.

A. Attorney statements was one by David Dow from University of Houston and another from a Scott Monroe.

And then, there was a statement by Sonja Panetti, and an affidavit by Jane Panetti, both of whom had been spouses of Mr. Panetti. Two other statements that were included was one by a Jessica McBride, and one by a Victoria Panetti, who was apparently a sister.

There were transcripts. There was a – I think a pretty complete transcript of the competence trial in September of 1994. And then, there were excerpts from the trial competence – the trial – the actual trial. And then, there were voluminous various writings, drawings and envelopes by Mr. Panetti.

Q. Okay. Did you – did the review of the psychiatric records – did you review records that were made before 1992?

A. Yes.

Q. Through the '80s?

A. Yes.

Q. Okay. Why are records which predate the events important?

A. Well, records in general are important because in order to make an accurate diagnosis, even a clinical one, what you need [17] is the history of the person and what their mental health problems have been over the years. But particularly, if you're doing a forensic evaluation, it becomes important to see if the psychopathology that you seem to be observing actually predates the crime, or if it's something acquired at the time of the crime or acquired thereafter. And from the early pre-crime days, if symptomatology is consistent with what you're seeing today.

Q. Does it also play into determination of someone who's malingering their mental illness?

A. Yes, it does, because, again, you're looking for consistency and you're looking for something that predates the time when they had any motive to malinger.

Q. Okay. Who have you spoken to in connection with your evaluation of him?

A. Okay. I've spoken with a Karin Eberhart, who is a pen pal and long-time visitor/friend. I've spoken with Yvonne Panetti, who is the defendant's mother. I also spoke with several people at TDCJ, one was a Victoria Williams, who's an officer in the visiting room. Another was a Sheila Ford, who's an officer in the visiting room. And then, on the first day that I was there, I spoke, very briefly, with another Ms. Williams in the visiting room whose first name I didn't even manage to get.

Q. She's a different Ms. Williams –

[18] A. They're two different people.

Q. – than Victoria Williams?

A. Yes.

Q. Okay. And Karin Eberhart is the pen pal and visitor from Switzerland?

A. That's correct.

Q. Have you examined people diagnosed with schizophrenia before?

A. Yes. Probably the major portion of our population in our inpatient units in federal Bureau of Prisons hospitals are diagnosed with some form of schizophrenia.

Q. What are the symptoms generally of schizophrenia?

A. Schizophrenia can look different in different individuals, but in general the symptoms would be you have what we call positive symptoms, and that would be things like hallucinations, and what that means is you see, hear or feel things that aren't really there. Hearing voices is commonly one of the symptoms.

You could also have what are called delusional beliefs. And a delusional belief is a belief that's patently false and that can be demonstrated to be false, but you cling to it, regardless if you have schizophrenia.

You can also have a thought disorder which means that your speech can become garbled, you can show confusion, it can be disorganized. You can put forth a stream of ideas that are [19] only very loosely, if at all, related to each other. It's just a general lack of logic in your thinking.

And then, you can also have in a case of schizoaffective disorder, which I, by the way, believe Mr. Panetti has, certain mood symptoms, either, you know, very hyperactive, very up moods, or very depressed and down moods.

Q. Do you need some water there?

A. Yes.

Q. I think that's – I think that's got water in it. I didn't check, but I assume so.

A. Whatever it is will work.

And then, there are negative symptoms. A negative symptom of schizophrenia are things like flat affect, or inappropriate affect, which means people laugh at times when nothing is funny.

Q. Okay. You also – you've just said, too, that schizophrenia can express itself differently in different persons. Can schizophrenia also fluctuate in the person?

A. Oh, it definitely fluctuates in the person. There are times when people are in what we call spontaneous remission and can seem perfectly fine for a period of time, and then, there are other times when they can be acutely psychotic. They may have episodes, they may have them frequently, they may have them less frequently. Medication, for example, can help with the schizophrenia.

[20] Q. Can people who are unfamiliar with what you've just said about schizophrenia mis-perceive the disease in a person and think that they don't have it?

A. Oh, yes. In fact, when I was with the Federal Bureau of Prisons, one of the things I did was plan training seminars for people who worked in corrections simply because, typically, when they first came to work at the mental health unit, they would see these people simply as either acting out, or being uncooperative, or being silly.

Q. Okay. What was your overall impression of Mr. Panetti?

A. My overall impression of Mr. Panetti is that he has a serious psychotic disorder, most likely from the symptoms both in the chart and that he exhibited to me as schizo-affective disorder.

Q. And did you think he had schizophrenia?

A. Yes, that's a form of schizophrenia.

Q. I understand. Okay. Did you see him again?

A. Yes. I saw him again the following Monday.

Q. Okay. Would he see you?

A. Well, initially he was apparently a little reluctant, but the assistant warden agreed to go up and talk to him to see if he could talk him into seeing me. And apparently, they later came back down and said, well, he is not sure, but he will see you if this evaluation is court-ordered, and I said, yes, it was. And that was when he came down.

[21] Q. And the warden was Warden Jones?

A. Yes. That's correct.

Q. Okay. Did he express a fear to you that he was being monitored in that second interview?

A. Yes. He told me, right away, that the room was bugged, and he just wanted me to know that he couldn't give a complete interview because the room was bugged; and furthermore, that anything going on in the room next door, which was another attorney visit booth, they would be able to hear him.

Q. At one point, did he hear a remark about a beer can?

A. Yes. He said that didn't I remember from the time before the beer can popping next door.

Q. And was there any beer can popping next door that you recall?

A. I don't recall any can popping. I can't imagine there would have been a beer can.

Q. Okay. You were in the prison unit, right?

A. Yes.

Q. Okay. Were you able to follow his train of thought in that second interview?

A. You could follow him sometimes and sometimes you couldn't.

Q. Well, what were the problems that you encountered with him in that regard?

A. Well, he has symptoms which are often referred to as flight of ideas and loose associations, and that is he talks [22] rapidly, in a rather pressured manner, but he goes on from topic to topic, and often you can't see the relationship between those topics or where he's going with that.

Q. All right. I'm going to ask you for some examples in a minute, but let me ask you, too: How was his demeanor through that, that is, what did he look like and what did he do physically?

A. Physically, he was fairly still. He had a steady, intense stare most of the time, looking at me. The majority of the time is what we call his affect was quite flat. In other words, his face was rather expressionless. However, a few times, suddenly he would smile at a time when I would be thinking, what's this about? I don't know what this smile is in reference to, and it hinted to me what I called inappropriate affect.

Q. Okay. Did he sing? Did he break out in song at any point?

A. Just once. He sang me one hymn.

Q. He sang you a hymn?

A. Uh-huh.

Q. Okay. And did he preach to you?

A. Yes.

Q. And that is, he's not having a conversation, I mean, he's trying to convince you of some religious belief, right?

A. Well, he explained to me, that although I may think that I [23] was there to perform a professional service and he hoped sincerely that I was well paid for that service, that that was actually incorrect, that God had sent me there to hear his word.

Q. For you to hear his word?

A. Yes. Meaning God's word through him.

Q. Through him. Right.

Okay. In your opinion, does Mr. Panetti know that he is on death row?

A. I believe he does, yes.

Q. Do you believe that he is aware that the state intends to kill him?

A. I believe he's aware of that, yes.

Q. What did he say about that? What was your – what's your basis for that conclusion?

A. Well, he said several things. He said that – well, first of all, in the chart, in the TDCJ records he has said that the state intends to kill him. He said to me that there is no treatment here. The only reason people are her is to be killed. And then, he talked about executions in general, his own and other people's.

In fact, there was an execution the Thursday night that I was actually there, and the person had been taken out – they call it a walk-by – for execution, and he knew this man, and he spoke with me about that and asked me if I knew [24] it. And I actually wasn't sure, Monday morning, if this person had been executed or not, or if he got a stay, because he knew if you come back, you get a stay. If you don't come back, then you don't, and you're in one of two places, as he explained it to me: you're either with the Lord in the light, or you're in a place so terrible you don't even want to think about it.

And so, he asked me and he also asked Warden Jones, who informed him that, yes, this person had been executed. And he looked sad for a moment, and he said, well, I'll pray that he's at peace with the Lord.

Q. Okay. What did he tell you about his understanding of his killings of his in-laws?

A. He would say almost nothing about that. And let me preface this by saying that he doesn't make these points, point number one, point number two, point number three. These are statements that I'm kind of pulling out of his very garbled speech. When I asked him about the killing of his parents, he said, at one point, well, you have to understand, I'm not in denial, but it would be a sin to talk about the past. And then, he seemed to be saying that God had nullified it, God had forgiven him, God had wiped

the slate clean. In fact, he uses the phrase "wiped the slate clean," and it would be actually sinful to talk about that because it's no longer an issue; it's over.

[25] Q. What did he tell you regarding his understanding about why he is to be executed?

A. His understanding of why he is to be executed is a part of spiritual warfare, and that spiritual warfare is war between the demons and the forces of the darkness and God and the angels and the forces of light, which he said there are angels but they do not have wings. He pointed that out several times. And the reason that the state wants to kill him is not what they're saying.

He says granted he understands that the state is saying that they wish to execute him for this murder, he knows that, but that that's really a sham, that that's not why the state wants to execute him. The state wants to execute him to stop him from preaching.

Q. When did he say that – he believes he's sort of under attack by supernatural demonic anti-forces?

A. Yes.

Q. Is that right? When does he believe – or when did he tell you that these forces first manifested themselves to him?

A. Well, he said – and the record confirms this – that these forces manifested in him in the middle '80s, when he believed that demons were possessing his house, and his furniture, and his possessions, and they were around him and causing him grief. And then, he talks about when he was in jail prior to his trial and he says – and this was really [26] hard to follow, so I hope I'm being fair to him.

He says that there was a diabolical sheriff who took him to a strange old doctor, and then, somehow that doctor did strange things with his medicine. And I didn't quite understand what it was and tried to clarify that. But then, he jumped on and said, and then, they wanted to shoot me. They tried to have me shot before the trial ever started.

Q. When you referenced, just a moment ago, about his demonic forces in the '80s, about the furniture, are you talking about the incident where he believed that the furniture was possessed by demons and he buried his furniture?

A. I talked about that incident is in the medical records. And I'm also talking about the statements by his then wife Jane Panetti, that he believed there were devils in the house and that he was seeing them on the walls, and that he was slashing them to get their blood out. And then, also, Mr. Panetti told me, while I was interviewing him, that he had to jab a knife into the ground to kill the demons on the ground.

Q. How long did you spend with him on that second interview?

A. Started about ten after 10:00, and I think it ended about a quarter to 12:00.

Q. Okay. In your opinion, does he perceive or appreciate the connection between his killing of his in-laws and his execution?

A. No. I think he thinks it's really part of spiritual [27] warfare, and that's what he has told other people. That's what he's told me.

Q. Do you believe he was malingering?

A. No.

Q. How do you rule that out?

A. Well, with this particular individual, what he was manifesting, if I could use that word, was severe thought disorder, and that means jumping from topic to topic in a totally illogical way. Now, in my 27 years of experience in practice, that is probably one of the most difficult things for anybody to malinger. It's easier to tell you that they have strange ideas, that they're hearing voices. But to actually mimic psychotic loose associations, not only to mimic it but to mimic it for more than an hour on end, is almost impossible.

Q. What is clanging?

A. Clanging means that you take a piece of a word – sometimes it's rhyming or just a piece of a word that makes no sense, and you repeat it.

Q. Did he exhibit clanging at any point with you?

A. Just once.

Q. Can you tell the Court, if you've got your notes, about that?

A. Well, this one I remember. Actually, it's worded. He was talking again about God and the holy spirit, and he said the [28] holy spirit, the holy spirit is a paraclete. Paraclete, parachute, paramedic.

Q. Okay. Can you give us some examples of his train of thought? You've described to the Court that you're pulling this – your information out, after sitting and listening to him for some period of time, but this isn't a

question-and-answer form. You're listening and he's just talking indefinitely; is that fair?

A. Well, put it this way. I attempted, particularly during the second interview, to do a question-and-answer form. His answers to my questions were often very long, marginally relevant, if at all. And I can give you a couple of examples, if I can look at my notes.

Q. You can. And there's nothing – is there anything unusual or surprising that you get unresponsive answers from someone suffering from schizophrenia?

A. No.

Q. Okay.

A. Okay. And I will say I don't have this word-for-word because Mr. Panetti spoke in very rapid speech, so it was almost impossible to take it down. And as most people would give you an opportunity to stop and take notes, he doesn't. He talks right over your notes and goes on with it, so it's difficult to get it. But I think this gives you an example of his train of thought.

[29] I asked him about a Sergeant Iron Horse, who is someone that, supposedly, he believed existed somewhere in his past but wasn't real. And so, he said, well, I thought there was a Sergeant Iron Horse when I was insane, but then, there was the Navy. I went to the Navy and you could be called sergeant in the Navy and that's where that came from, but no, it's not in the Navy because in the Navy, there aren't sergeants. But then, we buried Marvin, and we buried Marvin in the offshore in that accident. You know that his dad was a warrant officer. But you know you can make $30 a day as a cowboy, but your family needs more. You know, I like riding jobs.

Q. Okay.

A. And then, this next one that I marked is just a better example of what I call loose associations, which means putting things together where you can sort of see a theme, but it doesn't make a lot of sense. He was talking about shaving equipment, and then, all of a sudden, he began talking about Darwinism and creationism. And I then, at one point, said, what do you mean? And he said, I mean, I go to the mountain tops. I went to the mountain tops in Montana. There are pretty mountain tops in Montana. But then, you have to understand that Naval technology is sophisticated.

And then, he went on to talk about Russian technology being more sophisticated. And did I know about John Ballard [30] and the Titanic. Was I aware of what might be at the bottom of the Black Sea. It might be Noah's Ark. Noah's Ark is very big. You know it's the size of the U.S.S. Reagan because it has to be in order to hold the dinosaurs. You know, the government of Malta tried to hide that history, but the New York judges wouldn't let them.

Q. But the New York judges wouldn't let them?

A. Again, this can go on and on and on, much more than I could ever take down.

Q. And is this looseness of associations difficult to fake?

A. No, it didn't. As I said, he went on and on as long as he did. It would make – it would be almost impossible for him to be fake. It's also in the record, and it's also several staff members at the prison told me.

Q. Is it true that in training for some psychologists or psychiatrists that they actually in their school tried to mimic or fake some sort of severe mental illness and see if they could keep it up?

A. I've tried to do that for role plays.

Q. That's what I mean. How do people do?

A. It's hard. It is hard to – I mean, you have to plan it, and you could go on for maybe five minutes and then, you run out of steam. You can't think of any more ways to put these wild ideas together.

Q. Okay. Did you learn in your speaking to the prison guards [31] and others that he's exhibited this behavior to a number of different people over time?

A. Yes. In fact, the question I specifically posed to them is, you know, all – in fact, one officer – we'll start with the first one. The first, Ms. Williams volunteered to me, as I was leaving, and she said – put her arm around me and said, are you okay? And I said, yeah. I'm fine. Why? And she, said because you had to talk to him for an hour and 20 minutes, and I know how it goes. And I said, how is that? And she said he talked about religion and it didn't make any sense and it didn't fit together, and it's really hard to listen to him. You usually turn him out.

Then, I interviewed the second Ms. Williams, on the second day. And I asked her if, you know, this religiosity was common in his speech, and she said yes, that it was, that he does that all the time. That he does it not only in the visiting room, but she said he also does it back on what they call the pods. And sometimes this very much irritates the other inmates, and they would like him to basically

shut up, but he doesn't notice that. He's oblivious to that and keeps on, anyway.

She said that he knows quite a bit of scripture. And she said a lot of times, the scripture is right. He's really quoting the scripture that's actually there, but he just isn't putting it together in the right way. And then, I interviewed [32] the third officer, Ms. Ford, and she basically told me the same thing. And by the way, these were separate interviews.

Q. All right. Would it be surprising to you at all that – well, you reviewed Dr. Parker and Dr. Anderson before. That was one of the things you looked at?

A. Correct.

Q. In that they refer to a Captain Miller who indicates that he could hold a conversation, or he can have a somewhat ordinary conversation. Is that surprising to you if he could actually hold an ordinary conversation that's not about religion, or his execution, or that sort of thing?

A. I have no idea what Captain Miller said. But I know people like Scott Panetti talking about something very concrete in a nonstressful situation often can sound just fine.

Q. Okay. Do you think he understands that he is to be executed because he killed his parents-in-law?

A. No. I think he believes he's being executed as part of a spiritual warfare that's been going on since the middle 1980s.

Q. In your opinion, is his understanding about why he is to be executed grounded in reality?

A. No. I believe the state of Texas wants to execute him because he murdered his in-laws.

Q. Right. But is his understanding – doesn't he believe that the state wants to kill him for preaching the word of [33] God?

A. That's what I think he believes, and that's what he's told other people.

Q. Okay. And –

A. Over time.

Q. – that's not something that would be grounded in reality?

A. No.

Q. Okay. Pass the witness.

THE COURT: Ms. Dettmer.

CROSS-EXAMINATION

BY MS. DETTMER:

Q. Hi. My name is Tina Dettmer. I work with the Attorney General's Office. And we've never actually met before, have we?

A. No, we haven't.

Q. I wanted to start off with your – one of your last comments that Mr. Panetti does not know why the state is going to execute him. And your belief is that – or your opinion is that he believes that he's being executed based on spiritual warfare; is that correct?

A. My belief is this is a genuine delusion, yes.

Q. Okay. But you also testified that he knows that the state's – what the state's reason is?

A. Yes.

Q. Okay. And can you tell us, again, what he said about [34] that?

A. He says the state – I don't think I wrote it down exactly, but basically he said the state's saying that they want to kill me because of this murder charge, but that's not reality.

Q. Okay. So he knows – he has some knowledge that this is why the state is saying that. He knows that the state of Texas is saying, this is why we're doing this?

A. Right. He says, this is what they're saying. This is what's real.

Q. Okay. Now, you testified that you reviewed the competency trial from 1994?

A. Yes.

Q. What was the result of that competency trial?

A. He was found competent.

Q. Okay. Are you familiar with the standard for competency to stand trial?

A. Yes.

Q. Okay. Can you tell us what that is?

A. Is that you have a rational and factual understanding of the proceedings against you, and that you're able to assist in a rational, factual manner your attorney.

Q. Okay. Now, if you were to compare that to the standard for competency to be executed, which do you think from a mental health standpoint is more rigorous or difficult for a [35] person to meet?

A. Competency to stand trial.

Q. Okay. Do you remember from your readings of Dr. Simes' reports and the trial what the symptoms were that were reported of mental illness at that trial?

A. Seems to me that they were thought disorder, that he was probably hallucinating, that he had some delusional thoughts, specifically, commenting on religiosity. That's my memory.

Q. What about the loose associations? Were there any reports of his tangential thought or circumstantial thought?

A. Yes.

Q. So that was all reported back at the competency trial?

A. Yes.

Q. And he was found competent then, was he not?

A. Correct.

Q. Okay. And you're aware that that decision has since been upheld?

A. Correct.

Q. Okay. Now, the symptoms that you're reporting that he's manifesting now, or he was manifesting during your interview, are delusions, correct?

A. Correct.

Q. Hallucinations?

A. Correct.

Q. Loose association of thought?

[36] A. Correct.

Q. So essentially they're the same symptoms that he was displaying back in 1994, when he was adjudicated competent to stand trial?

A. I don't know if they're the same. I don't know if the delusions are the same for one thing.

Q. Okay.

A. Because he wasn't about to be executed at that point in time.

Q. Okay. But they are similar?

A. They're in the same category.

Q. Okay. You said that you don't know whether they're the same because he wasn't about to be executed back then, correct?

A. Right. In other words, as far as the delusion is concerned, his belief that the state is going to kill him, not because he has killed someone, but because they're engaged in spiritual warfare.

Q. Okay. So now, he has a different delusion.

Okay. Let's talk about malingering for a second. What – are there any things that you look for, in particular, when you're looking to see if somebody's malingering?

A. Yes. He specifically – let's see if I can get this two-day workshop down to a five-minute answer.

Q. I'm sorry. I apologize. Can I just back up and get you [37] to tell us what malingering is first.

A. Sure. Malingering means that someone is deliberately feigning something for purposes of specific secondary gain.

Q. Okay. And when you say "feigning," you mean making up, or could it be exaggerating?

A. It could be either, and that's one of the things that makes evaluation really difficult.

Q. So there could be some degree of realness to the symptoms, but then, there can also be some degree of exaggeration to the symptoms, as well?

A. Yes.

Q. Okay. I'm sorry. I didn't mean to cut you off.

So basically, someone who is feigning or exaggerating these symptoms for some external incentive, correct?

A. Yes.

Q. Is that what you said? Okay. What might be an external incentive? What might cause somebody to malinger?

A. Well, typical ones you see in the criminal justice is to get out of jail.

Q. To get out of jail? Okay. What about to escape an execution?

A. Sure.

Q. Absolutely. Would you say that's a relatively strong incentive –

A. Absolutely.

[38] Q. – for an individual? Okay. What about are you familiar with the DSM-4?

A. Yes.

Q. Can you tell us what that is?

A. The DSM-4, Diagnostic and Statistical Manual is the manual of psychiatric diagnoses, and it's sort of a guide to what is included in each diagnostic category.

Q. Okay. Can you tell us what the DSM-4 says about malingering as far as signs and symptoms or indicators to look for? Does it have anything to say about that?

A. It is a very short paragraph, and I don't recall what's in it.

Q. Okay. If I told you that – if I showed it to you, would that help refresh your recollection?

A. Sure.

Q. May I approach the witness?

THE COURT: You don't need my permission.

Q. (BY MS. DETTMER) I know there's a big book. There's lots in here. It's the tabbed page right there.

A. Okay.

Q. Once you have reviewed that, can you just tell us what the DSM-4 says about possible indicators?

A. Okay. Are you talking about this section that says, one should be suspected?

Q. Yes. Exactly.

[39] A. Okay. In a legal context – the medical legal context of the presentation, marked discrepancy between the person's claimed stress and the objective findings, lack of cooperation during a diagnostic evaluation and complying with prescribed medication treatments, and the presence of antisocial personality disorder.

Q. Okay. So basically what the DSM-4 is saying about malingering is here are four things that if you see these, you might want to be aware that this person may be malingering. It's possible?

A. You'd certainly want to evaluate.

Q. And the first one you talked about was the medical legal?

A. Context of presentation.

Q. Can you tell us what that means?

A. In other words, they're in trouble.

Q. Okay. So there's some – basically there's some incentive –

A. Right.

Q. – for them to malinger. And the second one was a marked discrepancy between what they're claiming?

A. About their claimed stress or disability and the objective findings.

Q. Okay. So that would be someone who comes in and says, I'm feeling this and then, maybe a psychiatrist or psychologist having an objective view saying, that doesn't really match up. [40] Is that what that's saying? Or can you explain that better?

A. Well, that would mean – no. I think this would mean something more like the person is claiming to have this particular belief –

Q. Uh-huh.

A. – which is bizarre. But then, you ask around to people that they talk to every day, and they don't actually have that belief at all. That would be marked discrepancy.

Q. Okay. And then, what was the third one?

A. Lack of cooperation during diagnostic evaluations and in complying with prescribed treatment/regimen.

Q. Okay. So someone who maybe was deliberately uncooperative could possibly be malingering?

A. Yes.

Q. And the fourth one was the presence of antisocial personality disorder?

A. Correct.

Q. Okay. Now, malingering, is it difficult to determine whether somebody is faking or exaggerating symptoms?

A. It's often a challenge. I mean, it's something we have to do all the time in the forensic context but challenging, yes.

Q. And who is in a better position to determine whether a particular individual has a particular mental illness, somebody who sees them once or twice, or someone who sees them for an extended period of time?

[41] A. That would depend, to some extent, on the qualifications of the person –

Q. Absolutely.

A. – that we're talking about.

Q. Okay. But assuming they're equally qualified?

A. Then, I think the other thing that you would look at is not only the time over which you observe them but the records that you have. I mean, you may not have personal observations, but you have records of not just one person but many people. And that's what you put together into an evaluation whether someone's malingering.

Q. Okay. So you're saying – are you telling me that it doesn't matter how long a person sees an individual as far as making a determination of malingering? Assuming that we have two equally competent mental health professionals and they have the same records and observations, is one of them in a better position to determine whether someone is malingering? Is it easier to do after one or two interviews, or is it easier and more accurate to do after seeing him for months or a period of years?

A. Certainly more observations are better.

Q. Okay. Thank you.

Now, considering – I'm sorry, let me back up again. What about a history of malingering? If an individual has – if there are signs in his records that he has malingered in [42] the past, does that factor into your evaluation of whether he could possibly be malingering in this particular instance?

A. It would certainly be a factor, yes.

Q. Would it be an important factor?

A. That would depend on what you're weighing it against. It would certainly be a factor.

Q. Okay. Were there any indications, or signs, or things that you should maybe suspect, are reasons to suspect that Panetti was malingering in this case?

A. Very little. We had some prison records which malingering tended to be ruled out, and I read those rather carefully, and they said malingering was a rule-out, but they really didn't justify why they thought he was malingering, especially on top of all of these other records by a myriad of professionals suggesting that he wasn't.

Q. Okay. So you reviewed his history; is that correct?

A. Yes.

Q. Okay. If I may, your Honor. I'm going to show you what's been marked as Respondent's Exhibit 3, and ask you just to kind of briefly look through that and tell us if you recognize those.

A. Obviously, I can't tell you page-by-page.

Q. Right.

A. But this appears to be a piece of the mental health records from TDCJ that I had.

[43] Q. Okay. And is there anything in the records from the TDCJ mental health – the mental health records that indicated that he had been malingering in the past? Can you point to anything in there that says –

MR. HAMPTON: Judge, I'm going to – there is a report by a doctor who is not going to appear. So I object on confrontation grounds.

THE COURT: You can object on confrontation grounds, but your witness has given an opinion based on those records. Your objection is overruled.

Q. (BY MS. DETTMER) Okay. If you could, there's Bates numbers on the –

THE COURT: The witness has already testified she reviewed the information there. She testified it on direct testimony. She also indicated that she couldn't find anything in the records that the conclusions or the impressions were based on, and counsel's entitled to cross-examine her on that point.

Q. (BY MS. DETTMER) Okay. On the bottom of those pages there are Bates numbers. And if you would turn to page – what's been marked as page 79. And I know some of these are really difficult to read, but we're going to try to get through them because I think they're important.

A. All right. I think I've got the right page.

Q. Okay. And there's a notation that says 10-26-95?

[44] A. Yes.

Q. At 11:30. It's on the bottom of the page?

A. Uh-huh.

Q. Can you read through that entry? And you don't have to do it aloud. I'll give you a second to read through it, and see if that refreshes your recollection about whether there are any indications in the medical records that he may have been faking or malingering. And it starts on 79 and goes to 78, because they're backwards.

A. And I am having a hard time reading it.

Q. Okay.

A. But if I'm understanding correctly, what it says was that he was apparently given a Rorschach, which is not a test I would use to determine if someone was malingering.

Q. Right.

A. And that he seemed evasive, which would not be surprising if someone was psychotic to be basing it on a Rorschach. And then, this person seemed to think that it wasn't due to florid psychosis, but I'm not certain why.

Q. Okay. On page 78, does it say – does it not say that he may have some loosening of his thought processes, but this appeared to be intentional on his part to create the impression of mental illness?

A. Well, you know, that's a very opinionated statement, but it doesn't tell me anything about the Rorschach scores that [45] would lead you to believe that.

Q. What I'm asking you is if there was a mental health professional who documented this on his records –

A. Yes.

Q. – it appeared there.

Okay. Could you turn to page 7 – I guess it's on that same page. Page 78, I'm sorry, where it says, December 7th, 1995?

A. Uh-huh.

Q. And on the second line does it read, he came into the room, talking gibberish and nonsensical? Do you see where we are?

A. You're doing better than I'm reading this handwriting. I think that's what it says.

Q. Okay. He came into the room talking gibberish and nonsensical. As I began to ask questions pertaining to how he was doing, he immediately began asking lucid questions relating to why he is not being treated.

A. Okay.

Q. Do you read that? Okay. So this particular instance, he came in talking gibberish and nonsensical but then, when asked lucid questions, he could respond?

A. Which is – as I said, would not be surprising for someone with a thought disorder like Panetti's.

Q. So he can turn it on and turn it off?

[46] A. Depending on what he's talking about and the level of stress.

Q. Okay. Fair enough. If we could continue and turn to page 110 of those records. And if you could start reading

for me – and this is typed, so it should be easier. He talked about wounded sunburn –

THE COURT: Counsel, I sustained the objection of the petitioner's counsel with regard to a question. R-3 is not in evidence. And you're reading from an exhibit that has not been admitted into evidence. Now, counsel can stay asleep, if you wish, or you can object, if you wish, but we're going to have to resolve this at some point in time.

MR. HAMPTON: Re-urge the same objection.

THE COURT: Re-urge the same objection on confrontation on a record that could be proved up as a –

MR. HAMPTON: Yes.

THE COURT: – business record.

MR. HAMPTON: Yes. And under 803.

THE COURT: Well, under 803, I overrule it. That's the whole point of me being here. That's the whole purpose of me scheduling two days to try to determine what I need to determine.

MS. DETTMER: Your Honor, I would move that we admit the Exhibit 3.

THE COURT: Then, you'll have to prove it up like a [47] real lawyer.

MS. DETTMER: Okay.

THE COURT: All right.

MS. DETTMER: Is it possible to take a witness out of turn to do that?

THE COURT: Yes. All you have to do is tell me that you're going to prove up these records that the witness has reviewed and, apparently, are the documents of the Texas Department of Criminal Justice, and that you are going to prove them up as business records. Are you going to do that?

MS. DETTMER: Yes, I am, your Honor.

THE COURT: The objection's overruled. You may proceed.

MS. DETTMER: Okay. I'm sorry.

Q. (BY MS. DETTMER) Going back to Exhibit 3, page 110, starting with he talked about wounded sunburn. Can you tell us what the doctor noted in that particular instance?

A. Well, he was saying that he talked about this wounded sunburn and that there seemed to be switches in his vocabulary and tone of voice. And then, in this doctor's opinion, it seemed well-rehearsed and had the distinct feeling it was contrived. Patient had own agenda, kept turning this interview toward the alters. He seemed to want to lead us or impress us. Again, that was his opinion.

Q. Okay. So there was a mental health professional who's of [48] the opinion, again, that Mr. Panetti may have been deliberately trying to prove that he had some sort of mental illness, correct?

A. Yes. Uh-huh.

Q. Okay. If you would look at page 72 of that exhibit. And, again, I apologize. I know these are difficult to read. But about halfway down the page, does the doctor note in

that particular instance that the patient is not as confused as we originally thought he might be?

A. Does he note that, yes.

Q. Okay. And this was in – what was the date on this one? I'm sorry.

A. January 4th, '96.

Q. Okay. So we begin in October of 1995, and now we're up to January of 1996, and a couple of months have gone past, and the doctors apparently have been evaluating him. And correct me if I'm wrong, because you've reviewed these records – and they still continued to believe that he is not as confused as he originally made out to be; is that correct?

A. They continued to question that, yes.

Q. Okay. What about on page 65, in an entry for February 27th, 1996?

THE COURT: What was the date, counsel?

MS. DETTMER: That was February 27th, I believe, 1996. And can you tell us if there's any indication in this entry [49] that Mr. Panetti may be malingering?

A. Simply Dr. Gilhousen's opinion that this looks like malingering.

Q. (BY MS. DETTMER) Okay. What about turning over to page 60? In an entry dated April 16th, 1996, is there anything in this entry to indicate that he may be malingering or exaggerating his symptoms?

A. I can't quite read it, but this individual believes that this might have been, obviously, manipulative and theatrical.

Q. He's speaking about Mr. Panetti; is that correct?

A. Yes. Uh-huh.

Q. Let's turn it to page 57. And in an entry dated 6-10-96, what remarks does the mental health professional make there regarding Mr. Panetti?

A. Okay. Let's see if I can read that. He said he was clear – this has to do with the disciplinary hearing. He said he was clear and logical in the disciplinary hearing, and symptoms seemed to be consistent with Axis II.

Q. Okay. Does it also say –

A. He said he doubted his Axis I diagnosis.

Q. Clear cognitively and manipulative?

A. That was Dr. Gilhousen's opinion on that day.

Q. Let's look at page 32, and this is in August 29th of '97. I'll give you a second to read that. At about halfway down where it says, no thought or perceptual abnormalities were [50] observed, can you read that for us?

A. I think so. It says, no thought or perceptual abnormalities were observed although he may have adopted some religious preoccupation. For example, his spiritual treatment regimen, that is, something in a reference to Jesus in the bible. His self-diagnosis – of course, it wasn't a self-diagnosis – of schizo-affective disorder, appears to be arrogant and narcissistic, I'm special, if not another game like his previous diagnoses.

Q. Okay. Let me see. It says, his self-diagnosis of schizo-affective disorder appears to be an arrogant and narcissistic. And in quotations, it says, I'm special, gesture if not another game like his previous diagnoses of schizophrenia and multiple personality disorder.

A. That's Dr. Gilhousen's opinion and he's consistent by it.

Q. That's right. And he's seen him now – this is in 1997 so this is two years later. He's seen Mr. Panetti for two years, and he continues to maintain this same opinion, does he not?

A. He does.

Q. Now, based on your review of these records, from 1995 until this period of 1997, what did you note from those records? You've said that you reviewed them.

A. Well, I noted specifically that he was sent to Jester IV twice. And Jester IV is an inpatient facility where they have people who they suspect of having mental illnesses. He first [51] did time at Jester IV. He ended up being returned to his unit with an "I'm not sure, rule out everything" diagnosis, but he maintained on his psychotropic medication. And then, the second time was in 1997. And I don't know where exactly Dr. Gilhousen's notes come in terms of these hospitalizations. And at that point, again, they didn't come to a definitive diagnosis, and he left against medical advice. He demanded to leave.

Q. He demanded to leave?

A. He demanded to leave.

Q. Okay.

A. And so, as I look at that, there was a lot of uncertainty.

Q. Okay. Let me just – okay. I'm sorry. Continue. I asked you a question. You may answer.

A. No. Simply that – as I said in my direct testimony, I think there were several – Dr. Gilhousen being one – professionals at TDCJ that were absolutely convinced that this person was playing games. However, again, I think that is in contrast to the record of his entire life. I respect Dr. Gilhousen. I know him quite well. I think in this case he was mistaken.

Q. Okay. So the bottom line is, though, that for several years while he was in TDCJ, there were doctors who in their opinion believed that he was malingering?

A. Two.

[52] Q. Okay. And we've already talked about the fact that Panetti has a rather strong incentive in this case to malinger, does he not?

A. Yes, he does.

Q. Okay. He knows he's going to be executed?

A. Correct.

Q. Okay. When you began your interview, did you tell him the purpose of your interview?

A. Yes, I did.

Q. What did you tell him?

A. I can read it to you, if you'd like.

Q. Sure.

A. Dr. Conroy will only be conducting evaluation and will not provide me with any treatment. She will be evaluating me for the purpose of assessing whether or not I'm confident to be executed.

Q. Okay. So he knew why you were there, did he not?

A. He heard it, at least.

Q. Okay. Now, one of the other indicators or signs to look out for when someone is malingering is lack of cooperation, is that correct, in an interview, according to the DSM-4?

A. It's one of the things you look at.

Q. You said you reviewed Dr. Anderson and Dr. Parker's report?

A. Yes.

[53] Q. And their conclusion was that he was uncooperative; is that correct?

A. That was their conclusion, yes.

Q. Okay. Let me ask you this: When you went in, did you greet Mr. Panetti?

A. Did I greet him, in other words, say hello and shaking hands with him, yes.

Q. Did he respond?

A. Yes.

Q. He did. So he responded to your greeting?

A. Yes.

Q. Now, going back to Dr. Anderson and Dr. Parker's report, I believe, if you'll recall, they mentioned that he wouldn't even respond to their greeting. Is that correct?

A. I don't recall that specifically, but you may be correct.

Q. Okay. Now someone who has made a loose association of thoughts or schizophrenia, they're not incapable of responding to a personal greeting, are they?

A. Not necessarily but at any one time –

Q. Because he, obviously, responded to yours, did he not?

A. Those were different times. What was in his head at that time, I have no idea.

Q. Okay. But he responded – the point is he responded to your greeting?

A. Yes, he did.

[54] Q. Did he know that you were appointed by your lawyers – by his lawyers, I'm sorry?

A. Well, he didn't seem to because, apparently, there had been some miscommunication, and the name Keith Hampton meant nothing to him. He didn't know Keith had been appointed. So when I said – you know, he said, have you been sent by the court lawyer? And I said, yes, I've been asked to interview you by Keith Hampton. He'd never heard of him. So that was a rocky start to begin with.

Q. But he didn't know why you were there?

A. He knows I was there to do an evaluation.

Q. First competency to be executed?

A. Yes.

Q. Now, in your review of his extensive records, did you ever find a diagnosis for anti-personality disorder?

A. I think you meant antisocial personality disorder.

Q. I'm sorry. You're absolutely right. Antisocial personality.

A. Yes.

Q. All right. Which is also another indicator that a person is – could possibly be malingering?

A. You know, that's what the DSM says, but there's been some recent research on that by one of my colleagues.

Q. Okay.

A. And there doesn't seem to be much of a correlation between [55] antisocial personality disorder and malingering.

Q. Okay. But he does have a history – a documented history where doctors have thought that he's been malingering in the past?

A. Yes.

Q. And he has –

A. TDCJ.

Q. Okay. So, Doctor, is it possible that Panetti could be malingering in this situation?

A. It's possible in the sense its possible like the sun could rise tomorrow. I think it's highly improbable.

Q. But it's possible?

A. Anything's possible.

Q. And you saw him how many times?

A. Twice.

Q. Twice.

Now, you talked about – I'm sorry, counsel asked you about Major Steve Miller's conversation, and you said that it did not surprise you that he could hold an ordinary conversation?

A. No, it didn't surprise me.

Q. Okay. Would it surprise you that if he's able to hold ordinary conversations many times during the day with prison guards, would that surprise you?

A. No.

[56] Q. Okay. Is there any significance in the fact that the only time he apparently cannot hold a normal conversation is when he's being interviewed by mental health professionals?

A. Well, but that doesn't seem to be the case, because when you talk to the officers about his preaching and his religiosity and his relationship with the other inmates, he talks about his disconnected religious ideas all the time, not just mental health professionals.

Q. Okay. But he can answer questions –

A. Oh, sure.

Q. – can he not? Now if he was unable to do that, or refused to do that, in the interview with Dr. Parker and

Dr. Anderson, it would appear that that would be on purpose, would it not?

A. Not necessarily. I wasn't there for the interview. I don't know what his mental state was at that time.

Q. Okay. Fair enough.

As far as this loose association of thought, are there degrees of severity to this disorder?

A. Yes.

Q. So someone – is it possible – and I'm just asking if it's possible. Is it possible that someone could have some degree of this and, yet, exaggerate that?

A. In the sense that probably anything is possible, however, it's difficult to imagine someone exaggerating anything if [57] they're that confused. I mean, what you're implying is that they're going through some kind of mental machinations and planning this. And I think Scott Panetti, at this point in time, would have difficulty planning something that sophisticated.

Q. And that's your opinion?

A. It is.

Q. And I want to go back and talk about your conversation with him about the stay of execution and the individual that apparently was recently executed and Mr. Panetti's ability to understand that if you got a stay, that you were coming back, but if you didn't, you weren't.

A. Yes.

Q. So based on your opinion, he knows that if he gets a stay of execution, he's good; is that right?

A. That he doesn't get executed at this time, yes.

Q. Yes. And he's able to understand that?

A. He is able to understand that.

Q. I'll pass the witness, your Honor.

THE COURT: Okay. We'll take a 15-minute break.

(Recess.)

THE COURT: You may return to the stand, please, ma'am. You understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: You may redirect.

[58] RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Mr. Panetti – you reviewed those prison records, right?

A. Correct.

Q. Was he sent to the Jester Unit?

A. Yes, he was sent to Jester twice.

Q. When was that –

A. Once was in –

Q. -- approximately?

A. Once was in 1995 and once was in 1997.

Q. Why do you send an inmate to Jester?

A. Because there's a suspicion he may need psychiatric treatment in an inpatient setting.

Q. All right. Did they prescribe mainly psychotic medication according to those records?

A. They prescribed medication the first time.

Q. All right. Throughout this time, since he came to the prison, were there a number of other mental health observations made or records that reflect that he is genuinely severely mentally ill?

A. Well, there were a number of observations that led to his being sent to Jester for suggesting he's mentally ill.

Q. All right. So Dr. Gilliland's and Gilhousen's are sort of the exception to the rule of other people who have examined [59] him and decided that he is genuinely schizophrenic or severely mentally ill?

A. I'm not so – I can go so far to say that because the records are copious and you almost have to go through them note by note, which I did at one point but not recently. But Dr. Gilhousen and Dr. Gilliland seem absolutely determined that this man is malingering. And, again, my problem with that is the statements as to why are simply that's what they think.

Q. What test did they administer to come to that conclusion?

A. Well, as I said earlier, Dr. Gilhousen apparently had administered the Rorschach.

Q. Besides the Rorschach, what can we tell from those records?

A. Again, I read their notes and I have no idea why they've determined that this person is malingering, especially given that there's a history going back to the early 1980s of all kinds of mental health professionals, hospitalizations, et ceter [sic], saying that this was a genuine mental illness and that all of this occurred before he committed any crime. So I was baffled as to why they were so absolutely convinced with such faint notes that he was malingering.

Q. How long did these doctors spend with him?

A. You can't tell from the record.

Q. How many other people did these doctors speak to about Mr. [60] Panetti?

A. I don't know. I don't know what records they had, or that I don't know.

Q. We don't know what records they reviewed either, do we, from these records?

A. I don't know.

Q. All right. How would one know to fake one particular delusion? How would Mr. Panetti know that if he can't appreciate or give a rational explanation or connection between his execution and the murders in 1992, how would he know to fake that particular item with you?

A. Well, it's not just that he said that to me. At least according to Karin, his visitor, and according to his mother, these are things he's been saying for a long time.

Q. For a very long time, would that also include before the killing of his in-laws?

A. Well, before the killing of his in-laws, the records indicate that, you know, he felt that he was being persecuted by demons. I mean, that's clearly in the records. And as late as July of '92, the murders occurred in September of '92, I believe, when he was hospitalized he was claiming to be a Nazarite and being persecuted for that reason. So, I mean, this is not a new idea to him.

Q. And, also, through the '90s, don't the – you've reviewed the disciplinary records, as well, haven't you?

[61] A. Yes.

Q. Okay. And don't those disciplinary records reflect that he refused to groom himself on the basis that he was a Nazarite?

A. Yes, he has numerous considerate reports for refusing to shave.

Q. All right. So to a lot of different people he's going to look uncooperative. Is that a fair characterization of someone who is suffering from a brain disorder such as his?

A. I don't think it's fair because, as I said, when I interviewed him, some people would have judged him to be uncooperative. Why? Because he didn't directly answer my questions, because he was suspicious of me, because he demanded to know things that I, obviously, wasn't going to tell him.

I had no thought that this was simply an uncooperative person. I think this was a person with a genuine mental illness that the mental illness was interfering with their cooperation.

Q. You were asked during cross-examination so he can turn his mental illness on and can turn it off, turn it on and turn it off. Were you implying by that that he's got a conscious intention of making his mental illness take over his mind at will?

A. No. I think what I said – and if I misspoke, I [62] apologize. But I think what I said was, there are times when someone with a mental illness can answer concrete questions. Particularly, for example, on the first morning that I saw him, there was a great discussion about whether or not he was going to put on a clean jump-suit. And I think the conversation around the putting on the jump-suit, as I understood from the officer, was quite logical; but if you back away from that, the idea that he if he really understood that I was there to evaluate him for competence to be executed probably whether – which jump-suit he wore was not the central issue to be concerned about. But in terms of discussing the jump-suit, he was probably fine.

Q. When we talk about exaggeration, by exaggerated features or responses, are you saying that that is malingering if someone is mentally ill – let me ask you this first: Can a person who's mentally ill exaggerate their symptoms?

A. Yes.

Q. Okay. Do you think he was exaggerating his symptoms when he was interviewed by you?

A. If anything, oddly enough, he was pulling them down.

Q. What makes you say that?

A. Well, there was the thought disorder, and that was clearly there. But then, I would throw out questions which you typically ask people about mental illness. For example, do you hear voices? Well, he punted on that one. But then, when [63] he talked about God, I said, well, do you hear God talking to you? And now that's hallucinations, voices are the classic symptoms that people endorse regarding mental illness. They're the classic symptoms that malingerers endorse. And he started by saying, yes, God talks to me, and then, he very quickly said, well, He talks to me through His word and He talks to me through the bible, despite the fact that there's a record – other, you know, earlier hospitalizations that he admitted to hallucinations. He's talked to other visitors about hallucinations.

But suddenly, I'm interviewing him and he doesn't admit to me hallucinations, which would be the obvious one to endorse. And then, I asked him about the Sergeant Iron Horse, and Ranahan, and collection of people, Sarge, that he seemed to believe had some connection with him, and he blew that off. He didn't talk about people living inside of him. He didn't talk about people controlling him, although he's talked to some other people about that. He said, well, Ranahan just means top hand. That's what that meant.

Q. He was playing down Sarge Ranahan with you?

A. Yes.

Q. And someone who's faking more likely would have gone for the hallucination, and isn't that what malingerers typically do?

A. Typically they do.

[64] Q. All right. Are you familiar with Dr. Richard Rogers' clinical assessment of malingering and deception?

A. Yes.

Q. Second volume, second edition?

Do you agree with this statement, malingering is listed in the DS-4 – DSM-4 as a condition not attributable to a mental disorder? It's defined as the intentional production of false or grossly exaggerated physical or psychological symptoms motivated by external incentives. Malingering requires a deceitful state of mind.

Do you agree with that description of what malingering is?

A. Yes. And I don't think that in any way contrasts to the one in the DSM.

Q. And malingering is somewhat specific. Or at least your attempts to uncover when you're interviewing somebody for malingering, it's somewhat specific to the claimed illness such as amnesia, you would try to test him in one way. If they're faking a psychosis, you would test them in another way; is that fair?

A. Correct.

Q. Okay. And your opinion, again, on whether or not he is faking, specifically, the delusion that he is being executed for preaching the word of God, do you think that he is malingering on that delusion?

[65] A. I don't think he's malingering on that delusion.

Q. Okay. You read Dr. Parker and Dr. Anderson's report?

A. Yes.

Q. What did you think about it? Anything stand out from your point of view? Did it seem like it was a pretty ordinary clinical report?

A. Could you be a little more specific? I'm not sure what you're asking me.

Q. Have you reviewed other competency evaluations in the past?

A. Yes.

Q. Okay. How does the report by Parker and Anderson compare with what the other evaluations you see in the past in terms of the language that's used, the basis of their ultimate opinion, that sort of thing? Do you have an opinion?

A. I was surprised both of them interviewed him simultaneously. That was a little unusual. But other than that – again, if you have a specific question.

Q. Well, what did they leave out that you think they might have included?

THE COURT: It looks like all the lawyers are asleep today. Has the long holiday cleansed your minds of objections to evidence? Her opinion is not relevant. Let's go to the next issue, please.

Q. (BY MR. HAMPTON) Do you think that Mr. Panetti's [66] delusional system is a form of punishment?

A. I'm not sure I'm following you.

Q. Madness –

THE COURT: By whom, God?

MR. HAMPTON: No, Judge. *Ford vs. Wainwright* contemplates this as one of the bases for sparing Mr. Panetti, so I thought I'd ask my expert about that.

THE COURT: Well, they – you'd better ask it in such a way that at least the Judge understands it, as well as the witness.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) This delusion system that he has includes persecution, right?

A. Correct.

Q. He thinks he's constantly under attack by demonic forces that are trying to hurt him?

A. Correct.

Q. Okay. He lives with the belief that these various supernatural forces are conspiring and seeking him harm, right?

A. Right.

Q. Isn't that a form – isn't that a kind of a delusion that is a form of punishment for the person in your opinion?

A. I could only answer that in this way. It seems to have made his life miserable for years.

[67] Q. Okay. The other is that he's told you that he believes in other personalities, Sarge Ranahan killed his in-laws.

A. He didn't tell me that, no.

Q. But you've seen that reported –

A. Yes.

Q. – elsewhere. In Dr. Arambula's 1997 report, I think he mentions it there, right?

A. Correct.

Q. Okay. If he believes that other forces caused their deaths, then how can he come to grips with his own conscience? Have you got on opinion on that?

A. In his state of mind – I'm not sure I quite understand the question. But in his state of mind, God has forgiven, wiped the slate clean. It's all null and void. Oit [sic] is all simple and he can go back and visit them.

Q. Okay. So there's no reason to be coming to grips with his own conscience.

Is his delusionary belief – well, how can he maintain his delusionary belief, yet, have ordinary conversations with guards and other people?

A. Delusions tend to be content-specific. And, in fact, when you're talking to someone with a pure delusionary disorder, which he doesn't have, he has a schizophrenic one – but if you have someone who only has a delusion and that's their only symptom, unless you bring up the topic, you'd never know there [68] was anything wrong with them.

Q. And your opinion is he is incompetent to be executed?

A. In my opinion, he doesn't understand why he's being executed.

Q. All right. Pass the witness.

THE COURT: Do you have any further questions for this witness?

RE-CROSS EXAMINATION

BY MS. DETTMER:

Q. Ms. Conroy, you were asked if the opinions reflected in the medical records regarding the fact that Panetti – or they noted that Panetti was malingering was the exception, and your response was no?

A. My response –

THE COURT: She said she couldn't say, one way or the other, without rereading all of the information.

Q. (BY MS. DETTMER) Okay. Can you point to anywhere in Mr. Panetti's mental health history at TDCJ where somebody has actually diagnosed him with schizoaffective disorder?

A. Jester IV in 1995 had everything as a rule-out including schizo –

Q. Okay. But I'm saying in the last nine years of Mr. Panetti's life, can you point to a diagnosis of schizoaffective disorder in his medical records?

A. No.

[69] Q. Okay. Now, as far as the vagueness of the notes that you refer to with the doctors who noted that he was malingering, you don't know how long they matched, correct?

A. Correct.

Q. You don't know – just because there are no tests reflected doesn't mean there weren't tests conducted; is that correct?

A. It would be odd if they weren't in the medical records.

Q. Okay. And discussing all of Mr. Panetti's mental health issues prior to the crime in 1992 and leading up to the competency determined in 1994, he was, in fact, found competent in 1994, was he not?

A. Correct.

Q. And in addition to there being indications in the record that he was uncooperative, was there also not indications that he was manipulative?

A. In Dr. Gilhousen's opinion, yes.

Q. Which is different than –

THE COURT: Counsel, this is rebuttal of redirect. You've gone over that in detail.

MS. DETTMER: Okay. I have no further questions.

THE COURT: Under the old math, 1994 would be ten years ago, wouldn't it?

THE WITNESS: Correct.

THE COURT: Now, counsel asked if you were certified [70] in forensic psychology. Tell me what that means in Texas. Is there a license?

THE WITNESS: No. Actually –

THE COURT: And then, certification by an organization?

THE WITNESS: I have a license in the state of Texas, otherwise –

THE COURT: No one asked you that so that –

THE WITNESS: But I am. I do have a license.

THE COURT: I assumed you were and I thought we needed that in the record.

THE WITNESS: Board –

THE COURT: Tell me about your education, your degrees.

THE WITNESS: I have a degree from – in clinical psychology and doctorate from the University of Houston in 1976. And then, I pursued board certification, which is a diplomate awarded by the American Board of Professional Psychology, which is a national organization. It takes four to five years to go through all the procedures to get that. I received that in 1992.

THE COURT: And since I have never gotten a report from Springfield that anybody was mentally ill, I'd like to know what years you were there.

THE WITNESS: 1979 to 1989.

[71] THE COURT: Okay.

THE WITNESS: I was in charge of the service from 1984 to 19 –

THE COURT: Well, didn't start getting letters from them till '91. So that explains that.

One of the things that I'm concerned about, among many, is prior to your walking in on Mr. Panetti for the first time, do you have any idea whether or not he had been prepared, or knew anything from his lawyers, his family, or anything, that someone was coming?

THE WITNESS: What I was told by the attorneys was that some time – how long that was, I don't know – some time before Mr. Gross had sent him a letter, telling him that someone would be coming to evaluate him. However, after the first meeting, I think I mentioned earlier, I found out from Mr. Hampton that Mr. Panetti had never been told Mr. Hampton's name and had never met Mr. Hampton.

And so, when I came in and said, your attorney, Keith Hampton, has filed this motion and his evaluation has been ordered by the Court, he didn't know who Keith Hampton was, and he looked very suspicious and concerned. And so, that's where it started off. And it wasn't until, actually, between times that I talked to Mr. Hampton that I realized what the confusion was that the only name he knew was Michael Gross, and that wasn't the one that I was using. And so, he didn't [72] know where all this was coming from.

THE COURT: But the only information you have is that a letter had been sent.

THE WITNESS: Yes.

THE COURT: Okay. How would one evaluate a person if the person wouldn't communicate in any way, shape or form with them?

THE WITNESS: If that – and I've had cases like that.

THE COURT: I've had them in the courtroom. I've also had them in the courtroom where they didn't have any hesitancy in talking more than a day and a half much less than an hour and a half.

THE WITNESS: If I was lucky, I would have this person as an inpatient. And, therefore, Mr. Greer, in the Greer case that I mentioned earlier, was one that I had that I had four months of observation on.

THE COURT: A person who has been observed as much as Mr. Panetti could easily eliminate observation by either non-communication, or singing, or that type of thing?

THE WITNESS: He could certainly not communicate if he chose to.

THE COURT: Well, that's not my question. My question is with the experiences he's had with evaluators, whether they be psychologists, psychiatrists, doctors, lawyers, juries, whatever, he could well learn that failure to communicate [73] would prevent an evaluation?

THE WITNESS: He could have learned that, but at that point – and it's one of the reasons I talked to the staff. At that point, you look at what the observations are.

THE COURT: But you had –

THE WITNESS: Is this typical of him; does he talk this way all the time; does he do this all the time; does he sing hymns all the time, or is he just doing this for my benefit.

THE COURT: Now, as I understand your testimony, you see recorded in the records symptoms of your diagnosis well back in history, even before the criminal conduct that he was convicted of.

THE WITNESS: Yes, your Honor.

THE COURT: Is there any way to differentiate the degree of the mental illness? I mean, was it just as bad when he was in the process of his criminal conduct as it was in 1994, when he had his trials, or at the time that you saw him? Or is there any way for you to make any kind of protestation about that?

THE WITNESS: Some of it would depend on whether or not he was treated, and there are few observations on that that I think are important. At the time that I saw him at Polunsky Unit, to the best of my knowledge, what I can read from the records, he had not been on any kind of psychotropic [74] medications since 1995, which gave him time to deteriorate.

On the other time – other hand, at the time of his competence evaluation, it was only shortly before the trial proceedings that he discontinued his medication. He was actually medicated at Bell County jail for several years after his initial incarceration in 1992. So he had been off medication for a short period of time.

Then, in the '80s, you see him on and off and on and off medication. And, obviously, when he's not in the hospital, you don't have an exact record of that. It is likely with Mr. Panetti that his condition would be worse the farther he is from the medication, although one can't – I mean, one can't put a statistical formula on that.

In fact, one of the reports that was really telling to me on that – Dr. Simes interviewed him in 1992. And at the time Dr. Simes interviewed him – in fact, it starts out Dr. Simes' report talks about including antipsychotic Trilafon, the medication that he was on at the time, and then, goes on to say certainly some symptoms were there. And Dr. Simes was convinced he was mentally ill.

But you can tell from a lengthy report that he was able to carry on a reasonable conversation on medication, about the issues involved in the trial, which is another thing that leads me to believe that he is not malingering and that medication is apparently effective.

[75] THE COURT: Or that he just simply deteriorated with or without medication.

THE WITNESS: Without it, at least, he deteriorated.

THE COURT: But your information from review of the records is that he has not had any antipsychotic medication since 1995.

THE WITNESS: As far as I know. I could not find it in the record, and I asked him and he said, well, after I got out of Jester IV the first time, I took Depakote for a while. I think he took Depakote and something else, if I recall, but I don't see any record that he's had any medications since then.

THE COURT: Did you have the impression that he knew who you were the second time you walked in?

THE WITNESS: When he saw me, yes. But apparently, when they initially went up to tell him – and I had told him the Thursday that I was coming back on

Monday. I told him that specifically. But he didn't seem to know who's there. He said, unless it's my family, I don't want to see anyone. Unless it's my family or my lawyer, I don't need to see anyone.

And they explained my name and that I was an evaluator. And then, he sent down the question, well, is this court-ordered, which didn't seem to be connected – connecting me to the person he had seen the week before. Now, when he [76] greeted me, he seemed to know me.

THE COURT: Any further questions?

MR. HAMPTON: Yes, Judge, just one thing. Can I approach the witness?

THE COURT: You don't need my permission.

MR. HAMPTON: I'm sorry.

RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. I want you to take a look at – this is one of the jail records where I've highlighted it. Can you make that out?

A. To be perfectly honest, no. Somebody called.

Q. You were asked earlier if anybody had ever made any mention about a diagnosis of schizo-affective disorder. That 820 line there, page 26 of the soon-to-be exhibit.

A. Diagnosis given was Axis I Schizo-Affective Disorder.

MS. DETTMER: I'm sorry, your Honor. We don't have a copy of what she's looking at.

MR. HAMPTON: That's page 26 of the same – of your exhibit.

MS. DETTMER: I'm sorry. I didn't catch that.

MR. HAMPTON: Could you say that again?

A. It says – I think this is Ms. Thayes, but I imagine that's a medical records person. Said, "Diagnosis given was Axis One Schizo-Affective Disorder."

Q. All right. Thank you. That's all I have, Judge.

[77] THE COURT: Any further questions by the state?

MS. DETTMER: No, your Honor.

THE COURT: You may step down.

* * *

SUSANA A. ROSIN, called by the Petitioner, duly sworn.

DIRECT EXAMINATION

[77] BY MR. HAMPTON:

Q. Are you a licensed psychologist?

A. Yes, sir.

Q. When were you licensed?

A. I was licensed in 1985.

Q. Are you in private practice?

A. I am.

Q. How long have you been?

A. Since 1985.

Q. Where?

A. In Houston.

Q. Okay. When did you get your Ph.D?

A. I obtained my Ph.D. in 1984.

* * *

[79] Q. Did you interview and evaluate Scott Panetti?

A. Yes, I did.

Q. When did you do that?

A. I interviewed Mr Panetti on September 1st.

Q. All right. That was after Dr. Conroy did?

A. That's correct.

Q. What did you understand your purpose of the visit to be?

A. The purpose of my visit was to establish or to help establish competency to be executed.

Q. Okay. Did you – how long was your interview? How long did you stay with Scott Panetti?

A. I was there for almost five hours.

Q. Almost five hours?

A. Yes, sir.

Q. What was his demeanor toward you at that time?

A. When I first got there, I introduced myself. He was highly suspicious. I had to explain who I was, the purpose of [80] my visit. He did not recognize your name again. What I did is I pulled out the papers, because I had the paperwork that I had to fill out with TDC to be able to make the visit, and I showed him your signature, and my driver's license, basically, whatever form of identification I had with me, to convince him of who I was; and then, asked him if he wanted to talk to me and that it was important that we talked, if he could, if he would agree to it.

Q. Was it surprising to you at all that a paranoid schizophrenic would be suspicious of you?

A. No. His demeanor was consistent.

Q. All right. Was he cooperative with you?

A. Again, that's – it depends on how you define cooperative. I think he was as cooperative as he could be, based on my understanding of him and how a person with those kinds of symptoms would present himself. He was very suspicious. He was very guarded with me. And he had a lot of difficulty maintaining train of thought. So he had a lot of difficulty answering direct questions. He would go off on tangents. He would become circumstantial. He would go around in circles and come back to the answer eventually, but it was very difficult to communicate with him.

Q. Is that consistent with someone suffering from schizophrenia?

A. Yes.

[81] Q. Did you pretty well just let him talk and then, later guide him?

A. Well, I didn't have a choice, again. I mean, he would ramble on about many different subjects. And I interjected questions and tried to bring him back to certain topics that were important for us to discuss. But it was very difficult for him to adhere to a train of thought. He would continue to just ramble on and on and on on different subjects.

Q. What did he talk to you first about?

A. The onset, I told him I had reviewed some records. And I had seen an old Navy photograph of his, and I thought that would be a good way to break the ice with him. And for some reason, he became fixated on the types of hats that they wear in the Navy. And he described hats for me and rambled on about the hats, among many other things that he was discussing at the time. But he kept coming back to a particular type of hat that they wear in the Navy that is a cup-shaped hat, and how they wear the hat, and how you're supposed to put it on your head, and so forth. And he rambled on and on about this, interjected with many other things. But he went on for probably ten minutes.

Q. You could at least follow the hat train of thought, I suppose?

A. Correct. And he had some other things interjected in there, too.

[82] Q. Okay. You spent five hours with him. Is it important to spend time with someone you're evaluating?

A. Yes. I think especially in this case.

Q. Okay. Why is that?

A. Because the type of thought disorder that Mr. Panetti displays, which is characterized by this type of flight of ideas, it's very important to see whether or not he can sustain that type of thinking in terms of looking at issues, like malingering, which would be crucial in this case, whether or not he could sustain that type of behavior and thought patterns and speech for a prolonged period of time, and he did in this case.

Q. Did he, at some point, tell you why he believed you were there?

A. He told me that I – well, I had explained it to him beforehand that I was there to assess his competency to be executed, and at some point, he told me that I didn't need to waste my time, that he mine [sic] as well come out and tell me he was going to be executed for preaching the gospel.

Q. So his – he's telling you his belief that he's going to be executed for preaching the gospel?

A. Correct.

Q. All right. And you don't think he's malingering about that?

A. It's my opinion that he's not malingering.

[83] Q. All right. What records did you review in connection with your evaluation of him?

A. I would say ditto to all the records Dr. Conroy testified to, but I can probably list them again, if you'd like.

Q. That's all right. Who have you spoken to in connection with your evaluation?

A. I spoke to Warden Jones before I saw Mr. Panetti, and I spoke with Mrs. Panetti.

Q. Okay. What are the symptoms of schizophrenia?

A. Well, there are many symptoms. In this particular case, Mr. Panetti has a history of hallucinations – auditory hallucinations, which are hearing voices that are not there. And in his particular case, he has a set of fixed delusions that date back to the 1980s that have to do with – they're typically centered around grandiose ideas about him being sort of a messiah, he's here to preach the word of God, just to save other people, and he's put himself in sort of an elevated place in this regard.

Q. Can a person who is suffering from schizophrenia without medication hold an ordinary conversation?

A. At times. Again, it depends if you're not necessarily dealing with that fixed delusional system, at times they can.

Q. Okay. Could people mis-perceive the symptoms of schizophrenia?

A. Sure.

[84] Q. In people that are unfamiliar with schizophrenia, can they mistake a person's ability to hold an ordinary conversation and conclude that they're not mentally ill?

A. Absolutely.

Q. That does happen?

A. That does – and I can give you examples in my conversation with Mr. Panetti.

Q. I was going to ask you that. Did he, at any point, to you have a rather ordinary conversation about something?

A. At times he did. We talked about Polunsky, the unit, how things are run there, schedules for him, recreation times, what does he do with his time. He knows a few of the staff members by name. In fact, he told me a little bit about each one of them. He's very much – the staff is very professional. They treat him very well, and how some of the other inmates treat the staff, and how poor he thinks that is.

He talked about pornography being recently removed from TDCJ and he feels – his delusional system gets a little bit tied up into that because, then, at that point, he said that he's had something to do with that.

Q. And at that point, the delusionary system kicks in, again, and the symptoms of the schizophrenia are then more apparent?

A. Exactly. But he was able to carry that part of the conversation fairly well. And then, when we got into the pornography that he became a little bit delusional again. He [85] started talking about how he's had something to do with that. That's part of his gospel, that what he has to do in the prison system, clean out the system. And he expressed some guilt about having looked at a Playboy magazine, and when it was that he first looked at it, and went on and on and on about his childhood. And, again, he sort of went off on a tangent.

Q. His – the looseness of association and the fact that he keeps it up for such an extended period of time, is

that one of the things that leads you to believe that he is not faking his mental illness?

A. That and the fact that he didn't seem to latch on to other symptoms that he's had in the past. For example, one of them is the auditory hallucinations. It was my impression in interviewing him that he's not experiencing auditory hallucinations. And in interviewing him, he could have certainly said, yes, I hear voices. And basically, he said, I hear the voice of God, but I hear it as a still voice within. I didn't get the sense that he was trying to tell me that he was hearing voices at this time. And, again, with a personality who's another occasion he very much down-played all of that. As he said, that was part of his past.

Q. So rather than exaggerating, he's trying to play down certain things?

A. He did not seem to make an emphasis on those.

[86] Q. And one of the things that people who were trying to fake a psychosis do is they latch on when you give them the opportunity as to supposedly hearing things and seeing things that aren't there?

A. Well, particularly what people think are the most dramatic, obvious signs of psychosis, yes.

Q. How would you characterize Mr. Panetti's mental illness?

A. In my opinion, he exhibits signs and symptoms of a thought disorder. It's been very consistent with paranoia. He was very paranoid, had a lot of fixed delusions consistent with paranoid ideation, but clearly schizophrenic is the word.

Q. What's schizo-affective?

A. Schizo-affective, it's a thought disorder that has a – an affective component such as the symptoms that Mr. Panetti exhibited in the '80s: rages, manic episodes, sleeplessness.

Q. Did he talk about his visits with Dr. Conroy?

A. He did.

Q. What did he say about that?

A. He kept calling her Dr. Connelly and I corrected him. I said, I think that's Conroy from what the warden told me. He told me that first time he wasn't very nice to her. He didn't like her very much. And then, she came back, and then, she was okay.

Q. Did he tell you about his visit with – from Dr. Parker and Dr. Anderson?

[87] A. He did.

Q. What did he say about that?

A. He seemed very paranoid about them. They thought that the fact that they came together meant something suspicious that they had something going. And the inference that he gave me was that it was something sexual between them, and that Dr. Parker was – had brought Dr. Anderson, I believe was the female, to entice him in some way. Dr. Anderson had dropped a pencil and she had reached over to pick it up, and that he was very suspicious that that meant something. They were trying to set him up to see how would he would react if he would have had a sexual response or not.

Q. All right. And in fairness, you're not saying that there is any relationship – such relationship between Drs. Parker and Anderson?

A. No, sir.

Q. That's just his perception?

A. His interpretation and perception.

Q. Did he exhibit clanging with you?

A. He did not.

Q. Did he exhibit loose association with your name?

A. Absolutely. He had all sorts of associations to my name, had me write down my name, talked about what it meant. And he told me about every other Susan or Susana that he's come in contact with in his life, going way back to early adolescence.

[88] Q. All right. In your opinion, does Mr. Panetti know that he is on death row?

A. Yes.

Q. Do you believe that he's aware that he is to be killed?

A. Yes.

Q. What's your basis for this opinion?

A. We discussed it and, again, he's very familiar with how the death row system operates. He keeps up with other inmates who are being executed. As Dr. Conroy says, he knows when somebody goes and comes back, it means that they had a stay of execution. And he talked a lot about praying for those people, and how he's there to save

them, that he has to pray – pray the gospel and try to save souls of people who are there on death row.

Q. Okay. Does he know that he killed his wife's parents?

A. Yes.

Q. Did he say why? Did he explain that to you in any fashion?

A. In a rambling sort of manner, he did. And it was difficult to get him to talk about it, but he did. He basically told me that he was insane back then, that he had been healed, that on that date, he went over there and he talked about detail – a lot of sort of circumstantial details about going over – driving over the bridge, changing his clothes, shaving his head. He told me he went there to free [89] his wife and daughter and that he believed that they were hostages, and that he went and tried to – in that his intention was not kill his in-laws, that he loved them, that he saw them as his parents, that he was really sorry. And that he worried a great deal about that he had been told that his daughter might have witnessed the murder, and he felt really bad about that and he wasn't sure if that was the case.

Q. Is this a rational understanding of the killing of his in-laws?

A. I believe so. Yeah.

Q. Well, is it a rational understanding in the sense of he was killing his in-laws with some belief of hostages being involved?

A. Well, hostages and, also, the – the delusional system involving Sarge that he was partly possessed by those entities, and that's what my notes reflect, also.

Q. I'll put it a different way. Is his understanding of his capital murder grounded in reality?

A. If I understand your question, no.

Q. Okay. Did he tell you why he believes he is to be executed?

A. He told me that he has been on death row, basically been put there to preach the gospel, that he's there to help and save other inmates; that there has been a conspiracy to kill him for years; and that the forces of evil, demons, devils are [90] basically set against him. And that it's a very fixed idea that he kept repeating to me about this.

Q. Did he also say they are trying to kill me to keep the gospel from being preached?

A. Yes.

Q. That is, the state was trying to kill him for preaching the gospel?

A. Correct. He said, there are good and bad people within the system. He's very split on that. He says there is good people, bad people within TDCJ. Good judges, bad judges. And it's all sort of a split between good and evil in his mind.

Q. All right. I'll pass the witness.

THE COURT: Counsel, save your cross-examination for a quarter of 2:00. Quarter of 2:00.

(Recess.)

THE COURT: You may take your seat, please, ma'am. Dr. Rosin, you understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: All right.

THE COURT: Ms. Dettmer.

MS. DETTMER: Your Honor, if I may address something, really quick, before we question this witness regarding what we offered as Exhibit 3. We've spoken with counsel during the break, and he waives the predicate to that and stipulates to the fact that they are the business records of –

[91] MR. HAMPTON: We have no objection to the authenticity, Judge.

MS. DETTMER: So we would move at this time to admit this exhibit into evidence.

THE COURT: All right. And that exhibit is what number?

MS. DETTMER: No. 3.

THE COURT: It is received without objection.

CROSS-EXAMINATION

BY MS. DETTMER:

Q. Hi, Ms. Rosin. My name is Tina Dettmer with the Attorney General's Office.

Were you in the courtroom during Dr. Conroy's testimony previously?

A. Yes, I was.

Q. Okay. So you – I want to – before I go into that, I'm sorry. I want to talk to you about your qualifications. Now, do you have any specific qualifications in forensics?

A. No, I do not.

Q. Okay. And have you performed competency examinations before?

A. Not for execution.

Q. Okay. What about competency to stand trial?

A. Three.

Q. Okay. Now, you testified that you reviewed several [92] records, but I'm not sure if you actually specified specifically what those records were. Do you mind doing that for us now?

A. I'll be glad to.

Q. Thank you.

A. I've reviewed hospital records, dating back from 1986 from Mr. Panetti, at different hospitals. I'm trying to recall this from memory. From Kerrville VA, from a hospital in Cumberland, from a VA Hospital in Wisconsin, from

the Waco VA, from a treatment center called Starlite Treatment Center. I also reviewed different doctors' reports, Dr. Simes, Dr. Cunningham, Dr. Parker and Anderson's report. There were several affidavits written by the first Mrs. Panetti, and a statement by Sonja, the second wife.

There were also transcripts of a trial of – I'm trying to think of the two competency evaluations that he had his competency trials, the first and the second one, with the testimony. And I may be leaving something out.

Q. His medical records from TDCJ?

A. Yes, ma'am, I did those, too.

Q. Okay. In speaking of the competency trial and the reports of Dr. Lee Simes, can you point to anything in your review of that record that indicates that the illness that Panetti reportedly exhibited then is more severe now, according to your report?

[93] A. It sounded from those records, if I recall them correctly, that he was exhibiting some of the same delusional thinking, grandiose ideation, pressured speech, and so forth. So it was very similar.

Q. Very similar. And are you aware of the results of the competency exam –

A. Yes.

Q. – in 1994? Can you tell us what that was?

A. He was found – on the second trial he had for that he was found competent.

Q. Okay. Now, you testified that you were in the courtroom earlier when Dr. Conroy testified, so you heard us go through all the medical records of his mental health history, correct?

A. Correct.

Q. And you heard us talk about all of the indications in the record that indicated that there were doctors at certain times in the past several years that he's been at TDCJ that have indicated that they believe that he was malingering, correct?

A. Correct.

Q. But your opinion is today that you didn't think that he was?

A. At the time I saw him, I did not think he was malingering.

Q. Okay. Based on your interview with Mr. Panetti, would you say that he was concerned about his execution?

A. He did not express a lot of concern. He said that [94] whatever happened would happen.

Q. Okay. You testified earlier that he kept up with the executions of other people, that he was aware of what was going on?

A. Absolutely, yes.

Q. Okay. Did he discuss his stay with you, his stay of execution that he received earlier?

A. No.

Q. Did he discuss the stays of other inmates that they had received?

A. I think he discussed the stay of one particular person. I can't recall the name of the inmate.

Q. Now, you testified that Panetti believes that he is going to be executed in order to prevent him from preaching the gospel, correct?

A. Correct.

Q. Now, you were also in here when Dr. Conroy testified that Panetti understands that the state is claiming that they're executing him for his part in the murders that he committed back in 1992; is that correct?

A. Correct.

Q. Do you agree with her assessment on that?

A. Can you repeat the question?

Q. Sure. Do you agree with Dr. Conroy's assessment that Panetti understands that the state's reason for executing him [95] is because of the murders he committed in 1992?

A. I would agree with that, yes.

Q. So he just doesn't believe the state essentially?

A. Correct.

Q. Now, you talked about when you first went into your interview with Mr. Panetti that he was suspicious, correct?

A. He appeared that way, yes.

Q. And what did you do to allay his suspicions?

A. I showed him the documents that I had with me, which were copies of the forms that we had submitted to the Polunsky Unit for people to be able to come and see him. It showed my name, it showed Mr. Hampton's name, and his signature, and basically I explained to him why I was there.

Q. Okay. So once you explained to him that you were there on behalf of his attorneys, he – that sort of helped allay his suspicions?

A. He seemed more comfortable, yes.

Q. Talking to you.

Your Honor, I think that's all I have at this time.

RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Dr. Rosin, about him becoming more comfortable when you mentioned his lawyers, did he recognize my name at any point?

A. No, he did not, know who you were.

Q. Okay. Did he refer to Mr. Gross?

[96] A. No.

Q. Okay. Was there any talk about Marine Corps?

A. We were – actually, after I introduced myself, he basically went into the hat deal with me. Started talking about the Navy hat so –

Q. All right. You've done three competency evaluations; is that right?

A. Correct.

Q. How many evaluations of people suffering from severe mental illness have you conducted?

A. Many.

Q. Hundreds?

A. Hundreds, yes.

Q. All right. Pass the witness.

MS. DETTMER: We have no further questions, your Honor.

THE COURT: Is it "Rose-in" or –

THE WITNESS: Rosin.

THE COURT: Excuse me. Dr. Rosin, are you opposed or in favor of the death penalty for capital cases?

THE WITNESS: In favor of the death penalty when its appropriate.

THE COURT: And when you see the same symptoms in the records, of course, with your training, because they are made generally, or you assume they're made by generally incompetent [97] people that make those.

THE WITNESS: (Moving head up and down.)

THE COURT: In your business of attempting to evaluate and give opinions, you utilize those opinions?

THE WITNESS: Absolutely.

THE COURT: Counsel asked you a question and – because it's an important question, and that is, you have no way of determining the depth of the mental illness today as contrasted with the depth of the mental illness prior to '92?

THE WITNESS: Correct.

THE COURT: Do you have any more information than – and I have it down as Dr. Conroy. Did y'all say it's Conway?

MR. HAMPTON: No, sir. "Roy."

THE COURT: Okay. Conroy. Do you have any more information other than Dr. Conroy's statement she believed that the records would infer that there have been no psychotic medications taken by Mr. Panetti at least for a couple of years?

THE WITNESS: From what I could gather from reading all these records, it appears that he did not take medication from 19 – from the mid-'90s, I believe, 1995 or so.

THE COURT: I think I recall where he refused to take the medication, at some point in time, but I didn't run short on it.

THE WITNESS: What he stated to me is that on April [98] Fool's Day of 1995, he had a revelation. He refused – he was healed, and then, from then on, he refused to take medication.

THE COURT: Well, that's his statement.

THE WITNESS: That is his statement. And I could not see from the record that he took medication from the mid-'90s on.

THE COURT: That would be, of course, after his conviction and sentence.

THE WITNESS: Yes, sir.

THE COURT: Do you know what communication, if any, Mr. Panetti had about your coming or who you were?

THE WITNESS: I understand that Mr. Hampton told me that a letter had been sent to him. Mr. Panetti did not seem to be aware about it at the onset. He didn't recognize Mr. Hampton's name. And I showed him those documents that I had to show him that, in fact, I had been sent by his attorney. And he looked at the documents, actually.

THE COURT: But you don't know what communication he may have had either with the lawyers, or the family, or anybody?

THE WITNESS: That's correct.

THE COURT: All right. Thank you. Any further questions, counsel?

MR. HAMPTON: No, Judge.

MS. DETTMER: No, your Honor.

[99] THE COURT: You may step down.

* * *

SETH W. SILVERMAN, called by the Petitioner, duly sworn.

DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Are you a licensed psychiatrist?

A. Yes, sir.

Q. Are you board-certified in forensic psychiatry?

A. Yes, sir.

Q. Who certified you?

A. American Board of Psychiatry and Neurology.

* * *

[103] Q. All right. The Court's already heard about the symptoms [104] of schizophrenia. As a medical doctor, what can you tell us about what happens in the brain with people who suffer from schizophrenia?

A. Well, it's –

Q. Generally?

A. I think most people – great majority of people agree that's a biological illness, it's hereditary. There's some biochemical parameters in terms of different levels of neurotransmitters. There are some people who espouse the fact that there's a specific decrease in the amount of brain material in different areas of the brain. I think that's a little bit controversial as to which areas. But most people agree that there are specific tissue problems when you have schizophrenia.

Q. Tissue in the brain?

A. Yes, sir. And there are ventricles where your cerebral spinal fluid kind of get circulated through your spinal cord, and there's a dilation now. There's not one specific thing that's identified with it, but it's clear there are abnormalities that are – and, also, with CAT scans when you look at circulation through the brain that there are abnormalities in blood flow. There's not one thing that's specific for it. And you can't do these tests and say, well, this person has schizophrenia, but there are clearly abnormalities that are being increasingly recognized with the [105] illness and the genetics are indisputable: 50, 80 to 90 percent penetrance in individuals who have parents who have schizophrenia.

Q. Is there brain shrinkage associated with schizophrenia, too?

A. In some schizophrenics, yes, sir.

Q. If you took a picture of a normal person and compared it to someone who was suffering from schizophrenia, would those two pictures look differently?

A. Probably. Like I said, there's not 100-percent correlation. It's not diagnostic. But there's a – a lot of data that shows there are tissue differences in people that have schizophrenia versus normals.

Q. Have you interviewed Mr. Panetti?

A. Yes, sir.

Q. When did you do that?

A. Last Friday, which would be the 3rd.

Q. How long did you spend with him?

A. I think it was over two and a half hours, but I'll say two and a half hours.

* * *

[109] Q. Does he know that he killed his wife's parents in your opinion?

A. Well, I went over this with him about five times because I think its ability. And the answer is he thinks that another individual named Sarge killed his in-laws, and at that time, Mr. Panetti was insane. I asked him that same question a number of times, and that was the best rendition I could get. This was the most logical rendition I could get, assuming I could piece together his thoughts, that it was Sarge, that he was insane at the time, and he takes no personal responsibility for that at all. Despite the fact that I told him, the best of my understanding, you killed your in-laws, we went over and over and over it, but that's as far as he went with it.

Q. Okay. In your opinion, is that a rational understanding of his killing of his in-laws?

A. Absolutely not.

Q. Would you say his understanding of this capital murder is grounded in reality?

A. He doesn't believe or doesn't understand that the reason [110] he's going to be executed is because he killed his in-laws. He doesn't believe that that's the reason.

Q. What did he tell you specifically regarding his understanding why he is to be killed?

A. Because he preaches the word of the gospel. He's very persistent about that.

Q. And that's consistent with all of the records that you've reviewed, the same reasoning?

A. Yes, sir.

Q. Okay. And your review of the records, too, to be real specific about it, includes psychiatric records from 1981 until 1992; is that right?

A. Yes, sir.

Q. And that reflects 14 different hospitalizations in six different hospitals, doesn't it?

A. Well, I didn't count them that way, but I'll take your word for it. A number of hospitalizations. It's chronic, it's repetitive, and it's consistent.

Q. It's before the killing of his in-laws?

A. Absolutely.

Q. In your opinion, does he perceive or appreciate the connection between his killing of his parents-in-law and his execution?

A. No.

Q. What is your basis for that opinion?

[111] A. It's what he told me repeatedly, and I've talked to other people.

Q. Well, could he have been faking it?

A. It's possible.

Q. Okay. Do you think he was?

A. Very clear that he is not faking that. Absolutely.

Q. Why not?

A. I think it's been discussed is I've never had that experience, and I've evaluated hundreds, thousand people. The first thing you want to decide is, are they malingering. I cannot imagine anyone having that intensity, that kind of specificity, grandiosity, and that kind of tangentiality with regard to their thoughts who could continue to do that, repeatedly, over that length of time. I just have never seen it. And I've evaluated a lot of people. I can't imagine anybody doing that.

So I'm very clear about my sense that he was not malingering.

Q. Did your review of the records also include the Waco VA Hospital?

A. Probably. I don't remember the specifics.

Q. Well, if someone gets hospitalized in the VA hospital and the VA hospital decides they're not malingering, what does that tell you?

A. Well, they have a higher sensitivity and, many a times, [112] tend to overemphasize that aspect of someone's illness.

Q. In other words, they're more sensitive to – they're looking for people to be malingering?

A. Absolutely. They're worried about – well, because it's true, and because there are people who are looking for three hots and a cot, for free medical care. The more times they get admitted, the greater likelihood that they're going to be disabled. There's a lot of money riding on that. There

are a lot of reasons to malinger. And I've actually seen a number of people at the VA. Like one guy threatened to stab me when I told him I didn't think that he was mentally ill. So there's a good reason in the veteran system to see a lot of people who are manufacturing symptoms for reasons other than the fact that they are truly mentally ill.

Q. Okay. Can you give us briefly just a couple of the – of examples of his train of thought that he expressed when you saw him last Friday?

A. Well, when we first met, besides the fact – I put my card up on the – my business card up on the glass so he can see who I am, and he kind of peered at it. And I'm not sure I can quote him, or I don't know if I want to quote him, but he separated about whether I was a Christian or saved, and Jesus, and Christ, and Jews, and how I had the word of God inside of me and the spirit, and just went on and on and on about that stuff. And that went on for about ten or 20 minutes because I [113] wouldn't tell him whether I was a Christian or not. And that was a recurring theme, although at the end, he did say that I did have the word of God inside of me. He made sure I wasn't God, but that I could speak for the word of God.

Q. Okay. And you don't think he's faking any of that?

A. There's no question in my mind.

Q. Did he mention any of the lawyers? Or what did you tell him about the purpose of your visit?

A. I told him that I was here to see whether or not he was competent to be put to death, whether he understood why he's being put to death. And I explained to him that there was no confidentiality, that everything we talked about could be just told to a report – or put to

testimony, and that he didn't have to speak to me. It was totally up to him. I'm not sure he understood that, but I wanted to explain that there weren't selective things that he could isolate as appropriate to the Court to understand.

Q. Okay.

A. And to answer your question, he did not mention any lawyers, and I did not bring up the specifics. And he did ask me which side I worked for, and I told him I was retained by the defense counsel, but he questioned me repeatedly. I don't think he really understood what that meant.

Q. Pass the witness.

[114] CROSS-EXAMINATION

BY MS. DETTMER:

Q. Hi, Mr. Silverman. My name is Tina Dettmer. You've been in the courtroom for the last two doctors who testified, have you not?

A. I think Dr. Silverman.

Q. I'm sorry. Dr. Silverman, I apologize. Were you in the courtroom when Dr. Conroy testified?

A. Yes, ma'am.

Q. And you were in the courtroom when Dr. Rosin testified?

A. Yes, ma'am.

Q. Okay. I want to start where you left off. You said that you didn't think that Panetti had any understanding of what it meant when you said you worked for defense counsel; is that correct?

A. That's what I said, yes, ma'am.

Q. Okay. Is that what you said? I don't want to misrepresent your testimony.

A. I don't remember. I get kind of nervous, but I think that's consistent with my understanding.

Q. Okay. But before you said that, you said that he asked you who you worked for, which side you worked for?

A. Correct.

Q. Okay. Why would he ask you which side you worked for if [115] he didn't understand what that meant?

A. Maybe he's learned to ask that. I guess what I was saying was he didn't understand that I was retained by the defense. He didn't seem to have a response like he did on that.

Q. But he asked you which side you worked for?

A. That's my recollection.

Q. Okay. Now, you talked about who you spoke with in formulating your opinion, and you mentioned an interne with the Texas Defender Service; is that correct? You also mentioned a Karin Erinhart, I believe – I believe you said her last name was?

A. Eberhart.

Q. Eberhart. I'm sorry. And some family members of Mr. Panetti's?

A. Yes, ma'am.

Q. Would it be fair to say that each of these individuals are friends or family, or people who are concerned about whether or not Mr. Panetti is ultimately executed?

A. Absolutely.

Q. And so, they may have some sort of bias –

A. Absolutely.

Q. – in their opinion of him?

With schizophrenia, is it possible that a person who has schizophrenia can still be competent to be executed?

A. Oh, I think most people are. Most schizophrenics are, so [116] the answer is yes.

Q. So the fact that Mr. Panetti has schizophrenia does not automatically disqualify him from being competent to stand – or, I'm sorry, competent to be executed, correct?

A. I want to make sure I answer it "Yes" or "No." Yes, you can have schizophrenia and be competent to be executed.

Q. And you said you reviewed the competency trial from 1994?

A. Yes, ma'am.

Q. And I know we've already talked about this with the past two experts, but can you point to anything in your review of the records or in your evaluation of Mr. Panetti

that indicates that his illness or mental illness is more severe now than it was back in 1994, when he was adjudicated competent?

A. I don't have absolute recall, but when they asked the different competency question ten years ago?

Q. Uh-huh.

A. I don't know. So I probably couldn't have if I read the whole thing again specific to that question, so I don't know.

Q. Okay. So you can't tell us whether or not his illness is severe, or less severe, more severe than it was back in 1994?

A. I suspect it's more severe, but I don't have a lot of data for me to substantiate that because he hasn't been medicated since '95. He had had some medication I reviewed at that time. There's some real specific records at that time where [117] he was logical and coherent, and he asked – I guess it was a psychiatrist to come back and see him two or three times –

Q. Okay.

A. – because he enjoyed it. So at that point in time, it looked like to me – and I can't tell you specifically in the trial but around that time, he was more lucid, coherent and logical when he took his medication. I suspect that since he had not taken his medication, his illness has progressed more significantly. But, no, I can't specifically say one thing in the record addresses that. But if you look at the whole thing, I would say, yes, he probably is more severely ill right now.

Q. If there were people who would testify that he is, in fact, lucid at times, you know, when he wants to be like he was in 1994, would there be any difference now?

A. I'd like to hear the conversation what the content is about. I think it's contextual. I think you can understand a lot of things on a certain level. If you ask for the underpinnings, it would be a little difficult. I think some people can drive. They may believe that people are out to get them. That's not an issue till they see a kind of car that really disturbs them. I've seen it all the time. So I would really like to see the conversation and the content, the specifics, and what the understanding was to be able to address that question.

[118] Q. So what disturbed Mr. Panetti in this case would be discussion of his execution, possibly?

A. Well, I'm sure that's one of the things. There are a lot of other things that don't make sense, but that's one thing.

Q. Okay. We talked a little bit about – or you talked a little bit about malingering. Earlier, is it important to you in determining whether a person is malingering to look at their history?

A. Absolutely.

Q. Okay. Did you look at his prior mental health records from TDCJ?

A. Yes, ma'am.

Q. Did you notice in there that there were several doctors, over a period of almost two years, who consistently noted that they thought he was faking or exaggerating his

illness in order to get a certain treatment or a certain medication?

A. I don't know that they gave the reason for it, but I do know there was at least one evaluation that just said malingering. It had no attention to detail or mental status examination to substantiate it. I don't remember someone specifically saying, he's doing this, he's lying because he wants to get this. He knows what he's doing. I don't remember that.

Q. If the records were to reflect that, would that cause you to – some concern in evaluating him currently?

[119] A. Concern? The stuff that was done six years ago, eight years ago, ten years ago, I think it needs to be a little bit closer to the point. I'd like to see those qualifications and how sophisticated the evaluation, documentation. You're asking me, I think, too broad a question for me to answer it specifically.

Q. Okay. Let me try again. And this may be too broad.

If a patient has in the past – let's hypothetically assume that a patient has in the past malingered in an attempt to get medication, or some other incentive, would that be important to know when you are interviewing him for competency when he has a huge incentive to malinger, would you not want to know that?

A. I'd like to know everything. Yes, ma'am.

Q. And would that not be important to your evaluation?

A. I can't tell you the importance until I look at all the other information, but it would be helpful to know.

Q. Okay. Now, you testified that Mr. Panetti has no rational understanding of why he's being executed, correct?

A. I don't know if I said – I don't know if you said, does he have a rational understanding.

Q. I'm sorry. Does Mr. Panetti know why he's going to be executed?

A. I don't think that he does, no.

Q. Okay. Does he know why the state says it's going to [120] execute him?

A. I'm not sure. I was listening to Dr. Rosin. I don't have an answer to that.

Q. Okay.

A. Actually, let me – can I qualify that?

Q. Sure.

A. I did ask him that specifically. I'm just recalling it. He did say that he is being put to death because he preaches the word of the gospel, and that's what they want him – that's why they're going to do it. He didn't – he doesn't associate, in my opinion, to the death of his in-laws.

Q. Okay. And so, if Dr. Rosin and Dr. Conroy were here earlier and testified that they believe that he is, at least, capable of understanding that the state says it's going to execute him because of the murder of his in-laws, would you agree or disagree with that statement?

A. Well, I have a different opinion. That's their opinion.

Q. Okay. I think we'll pass the witness, your Honor.

RE-DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Very briefly. Doctor, the phrase that he – or the question that he asked you is, which side do you work for, when you first – at some point during your interview; is that right?

A. I think it was something to that effect. I told him I had [121] been retained by the defense to evaluate him, and I believe after that, he asked me which side did I work for, something to that effect.

Q. All right. Could that question have reflected upon his delusionary belief system about the people he encounters?

A. Well, it's possible. I don't – I'm not so sure he understood what the question meant because his answer – or my answer didn't seem to affect anything at all. He kind of went on from there. So I can't answer that.

Q. Among the records that you reviewed, do you recall reviewing Dr. Simes' 1992 report from the competency trial or his testimony?

A. Vaguely.

Q. Okay. Well, Mr. Panetti was given certain medication for his competency trial that included Perphenazine. What's that?

A. Perphenazine is a first-generation anti-psychotic.

Q. All right. What is – what's a Temazepam?

A. It's a mild tranquilizer.

Q. How about Amitriptyline?

A. It's a first-generation antidepressant.

Q. If he was given two to four-milligram tablets of Perphenazine, three times a day, one to two 15-milligram tablets of Temazepam a day, two-milligram tablets of Benztropine a day, and four 25-milligram tablets of Amitriptyline a day, what would – what effect would those [122] drugs have on someone who is not schizophrenic?

A. I can't imagine anybody getting that dose waking up for two to three days. You cannot take that kind of medication if you are close to normal without absolutely being put out. And when you wake up, you can't think. You have kind of like the lights on, nobody's home. It just doesn't happen. And he, actually, before that had to be put on 32 milligrams of Stelazine and then, Trilafon. The maximum dose in the PDR is 24 milligrams. He got that regularly, and he was still walking and talking. You would have to be extremely psychotic just to tolerate it and then, benefit from it. To me, that's almost diagnostic – that is diagnostic of a psychotic illness.

Q. And that indicates to you that his schizophrenia is long-standing, at least till 1992?

A. Absolutely.

Q. All right. And to your knowledge, he's not on any medication today?

A. That's correct.

Q. Pass the witness.

MS. DETTMER: No further questions, your Honor.

THE COURT: Doctor, you said, and I wrote down, the defendant doesn't believe, then you said understand the reasons for the execution. You've been in the courtroom the whole day.

[123] THE WITNESS: (Moving head up and down.).

THE COURT: You need to say "Yes" or "No."

THE WITNESS: Yes, your Honor. I'm sorry.

THE COURT: And I've heard two psychologists, at two separate occasions, indicate in their conversations with Mr. Panetti he indicated to them that the state says they're executing me because of these murders, but they're really executing me because I'm preaching the gospel, et cetera. You heard that testimony?

THE WITNESS: Yes, your Honor.

THE COURT: Now, as I understand it, you didn't have a similar conversation with him, that is, he didn't say the same thing to you?

THE WITNESS: Correct.

THE COURT: When you asked him as to why he thought they were executing him, then he told you the religious presentation?

THE WITNESS: Yes, your Honor. I have a – I repeatedly questioned him about, you killed these people and the state wants to put you to death for that, and he dismissed it, said that's when Sarge was there and saying – and that they were going to put him to death because he was preaching the word of the gospel.

THE COURT: I take it at three different times, with three different individuals, it wouldn't be unusual for you to [124] get differences in his conversation?

THE WITNESS: No, sir.

THE COURT: A seriously mental ill person that had the type of medications that you've talked about in the early '90s, no doubt that a person who can still function – and we know he functioned because you read the transcript of the trial.

THE WITNESS: Yes, your Honor.

THE COURT: And you're telling me in your belief, because of the medication he was taking, that's a clear indication to you that he had a mental illness at that time and was, I believe you said, extremely psychotic?

THE WITNESS: Yes, your Honor. The fact that he could function after getting that medication speaks to the fact that he has a severe mental illness.

THE COURT: So anybody that has a severe mental illness where they are on medication – psychotic medication, if they were to accomplish criminal acts justifying a jury to give them the death penalty, and then, they just stop their psychotic medication for the several years it's going to take to run the appeals, what, in your opinion, would that result?

We just have a hospital for all people who had mental illness who refused to take their medications and – it's not a silly question. It's an important question. It comes out kind of silly, but it's not. You can't force a person to take [125] medication. And, obviously, somebody mentally ill who's on medication of that nature, when he stops, he's going to have some delusions. At least, I'm getting the impression that in the professional sense they will. Then, whether or not they have lapses in rationality or lapses in irrationality, the medication will certainly lead to delusions on occasion, wouldn't it?

THE WITNESS: The lack of medication?

THE COURT: Yes, sir.

THE WITNESS: The lack of medication would, depending on where they are were in the illness, will most likely be to a more severe refractory kind of illness. That's also sometimes part of the illness. Bipolar people don't want to take medication, schizophrenics don't want to take their medication, outside of whatever reasons there might be.

THE COURT: I understand. But most bipolar people are not facing capital punishment.

THE WITNESS: That's true.

THE COURT: All right. Now, I take it there's no question, in your mind, from your conversation with him that he knows that the state is trying to put him to death.

THE WITNESS: Absolutely, he knows that, in my opinion.

THE COURT: Any further questions?

MR. HAMPTON: No, Judge.

[126] THE COURT: Any further questions?

MS. DETTMER: No, your Honor.

THE COURT: Thank you. You may step down.

THE WITNESS: Thank you, your Honor.

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[126] GEORGE PARKER, called by Respondent, duly sworn.

DIRECT EXAMINATION

BY MS. STEWART:

Q. . . .

Dr. Parker, can you tell us what your occupation is?

A. I'm a licensed Ph.D. psychologist in private practice here in Austin.

Q. And how long have you been doing that?

A. How long have I been doing that? On a full-time basis, since 1977.

* * *

[132] Q. Approximately how much time did you spend interviewing Mr. Panetti?

A. Interviewing him, I would estimate a little over an hour. Approximately an hour.

Q. Okay. Can you tell me how the interview with Panetti began? Did you greet him?

A. Not well. As Dr. Silver – I can't remember what – said that he is an unusual person. And it started off with him attempting to take charge of the situation by inquiring about our – I say "our." Dr. Anderson and I were together – about our religious interests, and the nature of our faith, and that sort of thing.

Q. Did he return your greeting? Did he say, hello, how are you?

A. No. He wasted no time on anything like that. He got right to the religion. And we – I mean, it surprised us a little bit. I mean, I've talked with a lot of folks in my day, and I've never had anybody start off quite like that. And perhaps the easiest, simplest way through that would have been to answer his question, but it seemed inappropriate, and we weren't there to discuss our religion. So we explained that to him and discovered later that that apparently had really ticked him off, and he held that against us, and he, I [133] think, wasn't going to answer our questions because we had not answered his.

And later on, in an effort to try to break the log jam, we went ahead and confessed that, yes, we're Christians and – but it seemed to matter not at all by then.

Q. Okay. When you said that it came back to haunt you, do you recall specifically what he said?

A. I have written it in our report kind of the things that he was saying to us in that regard. As best I can recall, when it became clear to me that he wasn't going to answer the questions that we were there seeking answers to was when Dr. Anderson had asked him – well, I mean,

did you murder somebody, or why are you in prison here, or something to that effect. And he indicated that – it was kind of like – oh, and why won't you answer the question? I mean, just yes or no. I mean, did you murder someone?

And his response was something about, well, you remember the question that I asked you and – I mean, it became clear that he remembered the beginning of the session, and it was on his mind while we were talking. And since we had not cooperated with him, then he was not going to cooperate with us.

Q. And did that conversation lead you to conclude that he could carry on a logical conversation, that he could complete a train of thought?

[134] A. Well, that's a really good question. I think he is capable of carrying on a much more logical conversation than – certainly than he did with us, but that he has some significant psychological problems. I mean, I think only a fool would dispute that. But he – I just think he's more aware of what's going on and what he wants to do in certain situations than sometimes it appears.

But it's awful hard to have a, what did you say, logical conversation with him. I think it's very, very difficult to – for that to happen.

Q. Okay. In light of Mr. Panetti's lack of cooperation, were you able to reach any conclusions about his competency to be executed?

A. Ask me that one more time.

Q. Since Mr. Panetti was uncooperative during your interview, he refused to answer your questions, were you

able to reach any conclusions on his competency based on the interview alone?

A. No. I think it would be very unprofessional, unethical for me to render an opinion based on the interview alone. It became necessary to rely on other data.

Q. Okay. So in light of that, how do you form an opinion when a person you're evaluating won't cooperate with you?

A. Well, I mean, what I do, and what we did in this case, was rely on what collateral information we could gather. And, for [135] example, I sought, and was able to get, access to copies of some of his correspondence, letters that he wrote to people from the prison. And I also spoke with Captain Miller, and as did Dr. Anderson, and – to kind of get a feel for what Captain Miller saw as going on with Mr. Panetti. Those are the two collateral information sources I recall right now.

Q. Okay. Did you review any other information in preparation for making your report of your testimony here today?

A. Oh, yes. I read all the records that the previous witnesses have talked about here, the medical records, the VA records, the Starlite records, and so on and so forth. And, you know, the records from the penitentiary from his history while he's been at the penitentiary.

Q. Okay. Excuse me one minute, your Honor. Is Exhibit 3 still up there? Do you have a copy of what's been marked as Respondent's Exhibit 3?

A. I do.

Q. Okay. Which has already been admitted. Those are Panetti's medical or mental health records from TDCJ. Did you review those records?

A. Yes.

Q. Okay. Did you find anything of significance in those mental health records that aided you in your evaluation of Panetti?

A. Well, these records, of course, go back to the mid-'90s [136] and – I mean, '95, '96, '97, along in there. And it's quite clear to me from these records that the mental health workers, the psychiatrists, counselors, and so on, were having quite a time trying to figure out what was going on with Mr. Panetti. And the – there's a good deal in these records that indicates that they didn't think that he was really schizophrenic, after having been around him, and interviewed him, and interviewed him and had conferences, and so on. And there are multiple references to their concern that he's malingering his presentation and it's – I mean, there are – there's probably at least a couple of dozen references to that sort of thing in these records.

Q. Okay. We need Exhibit 4.

MR. HAMPTON: The letters. No objection.

MS. STEWART: Let the record reflect that I've handed counsel an identical copy of Respondent's Exhibit 4.

Q. (BY MS. STEWART) Dr. Parker, can you tell me what that is that I've just handed you?

A. Well, it appears to be a copy of the – copies of his – of Mr. Panetti's letters that were provided to me from the penitentiary.

Q. Okay. Your Honor, Mr. Hampton has already agreed to stipulate the authenticity of these records; therefore, we move to admit them as Respondent's Exhibit 4.

THE COURT: Hearing no objection, they're admitted.

[137] MS. STEWART: Thank you.

Q. (BY MS. STEWART) Dr. Parker, what role did these letters play in your evaluation of Panetti?

A. Well, that the bottom line of these letters to me indicates that there are times that Mr. Panetti can be socially appropriate. I mean, the letters are letters that are – you know, that you might receive from someone who's a relative, or a friend, or something like that. Perfectly clear that they also reflect his preoccupation with, you know, with religion, and God, and the bible, and so on.

You know, but he talks about things, asks about the welfare of people he knows, you know, makes inquiry about what's going on outside the walls, those kinds of things.

Q. So they do reflect some ability of Panetti's to produce lucid thoughts and socially appropriate thoughts?

A. At times, yes.

Q. Is it likely that an individual would be able to compose coherent letters such as these but be incapable of understanding their reason for his execution?

A. I would find that hard to believe.

Q. Can you tell me why?

A. Well, I mean, it's – he can be reasonably clear and lucid at times, so I don't know why in the world he couldn't understand what the state is up to here and what this is all about.

[138] Q. Okay. Dr. Parker, can you identify that packet of documents that I just gave you?

A. Yes. All I know is that it's called the death packet.

Q. Okay. Did you rely on that information that were referencing as Respondent's Exhibit 6 – your Honor, we'll be providing the witness to authenticate that later. Did you rely upon that information in forming the opinions found in your report?

A. I relied on this to the extent that it seemed clear to me – and I also had talked with Captain Miller about this – seemed clear to me that Mr. Panetti at least knew that he would be dead. It doesn't tell me that he knows why he is to be executed, it doesn't go to that, but he is going to be dead seems clear. And it refers to last meal, and what you want done with your belongings, and do you want a lawyer to help you with a will, and all that kind of thing. So that's what it does for me.

Q. And does it also indicate that Panetti is able to understand direct questions and to respond appropriately when he chooses to do so?

A. Well, sure. It strongly suggests that to me.

Q. Okay. Did you speak to anyone at the prison regarding Panetti in your evaluation of him?

A. Well, I reviewed all the records over there. But, no – I spoke with Captain Miller.

[139] Q. Okay.

A. I remember that.

Q. Did you find his – in that conversation with Captain Miller to be informative or helpful in your analysis?

A. Yes. And, in fact, as I said, Captain Miller is the one who mentioned this and eventually provided a copy of this for us. And it was my sense from what Captain Miller was saying that even though Mr. Panetti is unusual and, in fact, is known in the unit as "the preacher," he understands what's going on and understands what – why he is to be executed, and so on.

Q. Okay. Given all this information, what conclusions have you reached?

A. Well, the conclusions I reached are set out in my report. I can read those to you.

Q. Yes, please.

A. My conclusions while they're stated as my opinions on the last page of my report, there are five of them.

Q. Okay.

A. The first one is that Mr. Panetti is able to understand direct questions about his past as well as his present situation. And he could answer questions about relevant legal issues regarding his execution if he were willing to do so. Number two, Mr. Panetti consciously chose not to answer our interview questions about his past and his

present, as well as questions about legal aspects of his execution. Number three, [140] Mr. Panetti deliberately and persistently chose to control and manipulate our interview – our interview situation by deflecting the interview into religious topics.

Number four, Mr. Panetti knows that he is to be executed and that his execution will result in his death. And, number five, although Mr. Panetti chooses not to discuss the reason that he is to be executed, he has the ability to understand the reason that he is to be executed.

Q. So, in fact – well, let me rephrase. Let's begin with, is Panetti mentally ill?

A. I think so.

Q. But that mental illness, whatever it may be, doesn't necessarily preclude his ability to understand why he is being executed?

A. In my opinion, no.

Q. So it is reasonable to expect that Panetti could understand why he's being executed if he's told?

A. Yes.

Q. And when is Mr. Panetti able to function in a coherent fashion? When is he able to communicate effectively?

A. I don't know if it's all the time, and I don't believe it's none of the time. It's somewhere out there in the middle. And I couldn't assign a number to it.

Q. Is it fair to say that he is able to communicate logically when he chooses to do so?

[141] A. I think he can a lot more than he – well, certainly than he did with me, and that he appears to do at times with others.

Q. Okay. In preparation for your testimony today, did you review Dr. Cunningham's report?

A. Yes.

Q. Okay. Do you dispute Dr. Cunningham's observations?

A. His observations? No.

Q. Okay. But, yet, you disagree with his assessment of Panetti. Can you tell us why?

A. Well, I haven't looked at it for a while. It seems to me as though what Dr. Cunningham, who I respect highly, is saying is that Panetti is just too crazy to understand the reason that he is to be executed, and I don't dispute the observations that Dr. Cunningham reports. I just have a different opinion as to whether Mr. Panetti is capable of understanding.

Q. And you're basing your opinion on the fact that he – that there are these letters and that indicate that he can communicate when he wants to, and with your conversations with Captain Miller – or your conversation?

A. All of those things, yes.

Q. Do you need some water, Dr. Parker?

A. I might use some here. Is that okay, your Honor?

THE COURT: That's why it's there.

[142] A. I'm an old man. My throat gets dry.

THE COURT: Well, I think probably everybody's a little dry. We'll take 15 minutes.

(Recess.)

MS. STEWART: I have a personal matter. Could we talk off the record, your Honor?

(At the Bench, off the record.)

Q. (BY MS. STEWART) All right. I know you're never supposed to say this, but I really do only have a couple of more questions. Pick up where we left off.

Just because Mr. Panetti is preoccupied with religion and may even, at some level, genuinely believe that he is being executed for preaching the gospel, does that render him incapable of understanding why the authorities have ordered his execution?

A. Well, in my opinion, no.

Q. Okay. You have concluded to a reasonable degree of psychological/psychiatric probability that Mr. Panetti understands why the authorities have ordered his execution or that he could?

A. Psychological. I don't know what he understands, but that he is capable of understanding, and that it would make sense to me to believe that after all this time, he would understand. I mean, that's the best I can do on that.

Q. Okay. Thank you very much. I pass the witness.

[143] CROSS-EXAMINATION

BY MR. HAMPTON:

Q. Good afternoon, Dr. Parker.

A. Hi.

Q. You and I know each other?

A. Yes, we do.

Q. And you understand that I'm representing Mr. Panetti here today?

A. Yes.

Q. I'm going to ask you questions. I'd like to ensure that if you can answer the question "Yes" or "No," would you be willing to do that, answer the question "Yes" or "No," if you can?

A. I'll do my best.

Q. All right. And if you can't, just say, I'm sorry, I can't answer that with a "Yes" or "No." Does that sound like a fair way to proceed?

A. Let's try that.

Q. All right. You've done competency evaluations in the past, right?

A. Yes.

Q. And you know, if I understand, what is meant that a person to have a factual as well as a rational understanding about why he is to be killed, right?

[144] A. Why he is to be tried, yes.

Q. Well, when you were examining Mr. Panetti for competency to be executed, are you telling the Court that you were not trying to evaluate whether he had a factual as well as rational understanding of why he is to be executed?

A. Yeah. I was trying to evaluate that.

Q. With that standard?

A. I don't know I'd use those words at that time. But yeah, with that idea in mind that he understood that he had a – that he had an understanding. I think that would have to be my answer.

Q. Would it – so is it – are you saying that its unimportant that his understanding is irrational?

A. No, I'm not saying that.

Q. Okay. So while you were evaluating him for his understanding for competency, you were seeking to determine whether he had a factual as well as rational understanding. Is that true?

A. I would have to agree with that.

Q. All right. Fair enough.

You were the Director of Psychological Services, Chronic Pain Management Program at Shoal Creek from 1977 to 1983, right?

A. Yes.

Q. And then, you were the Director of Psychological Services, [145] Chronic Pain Management Program at St. David's Hospital from 1983 to '89, right?

A. Yes.

Q. And in 1992, you were involved in a workshop entitled Psychological Issues in the Treatment of Chronic Pain Patients, true?

A. I'll take your word on the date on that, yes.

Q. All right. Have you reviewed your own CV any time today?

A. Well, I looked at it.

Q. All right. Well, do you remember in '93, you presented to the Texas Association of Physical Therapists convention The Psychological Dimensions of Chronic Pain as a presentation?

A. I remember the presentation.

Q. In '94, you made a presentation of Mind in a Painful Body to the Southwestern Association of Disability Examiners?

A. Yes.

Q. In '95, you presented – had some different topics beginning in '95, Investigating Professional Incest to the Texas Board of Examiners/Investigators. Do you remember that?

A. Yes.

Q. And in '98, you presented to the Austin Criminal Defense Lawyers Association, Forensic Psychology in Sex Abuse Cases. Do you remember that?

A. I remember the presentation.

Q. All right. So you did do that?

[146] A. Yeah.

Q. You did make that presentation?

A. Yes.

Q. And in 2000, presented Assessing Sexual Offense Recidivism Risk to the same group, right?

THE COURT: You mean to the same group of lawyers?

MR. HAMPTON: Uh-huh. Yes.

A. I believe so.

Q. (BY MR. HAMPTON) All right. And chronic pain management, you agree, is a totally different field from dealing with people with schizophrenia, true?

A. Well, there are a few schizophrenics with chronic pain but – and some of them were in our program.

Q. But they're big –

A. So I wouldn't say they're totally different, but they're not identical, that's for sure.

Q. Well, I don't mean the people themselves that you're evaluating, but the field of expertise is different from chronic pain management to evaluating schizophrenics?

A. I mean, I wouldn't disagree with that. They're not the same things.

Q. They're not the same things. You noted in your written report to Judge Ables that it was especially important for you to rely upon collateral data to help establish a

basis for your professional opinion. You said that, didn't you?

[147] A. Yes.

Q. It's crucial in psychiatric evaluations that you as the evaluator, that you be objective, true?

A. Well, sure.

Q. And collateral data would provide some objective basis for whatever opinion you would have, true?

A. I would agree, sure.

Q. That would avoid a purely subjective opinion on the part of an evaluator, true?

A. It would help that, sure.

Q. And it would also help – as you say, help avoid just speculating about someone's state of mind, true?

A. Yes.

Q. Okay. And you're not here to offer speculations to this court?

A. I don't think so.

Q. Are you? Well, is that a "No"?

A. That's a "No."

Q. Okay. And you'd agree, too, that it's important as a psychologist to demonstrate to the Court the process through which you arrived at your opinion, true?

A. Insofar as possible, sure.

Q. Well, otherwise, the Court is simply left to choose which experts to believe, wouldn't you agree? Without some explanation of the process by which someone arrives at a [148] conclusion, the fact-finder, the Judge in this instance is left to – just to pick which opinion he wants to agree with, true?

THE COURT: Why don't you let me worry about that, and let's get to some meat.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) When you evaluated Mr. Panetti, you wrote a note to – you made your notes available to us, didn't you?

A. I did.

Q. Do you think you'd recognize your own handwriting?

A. Well, probably.

Q. You would hope so? All right. I haven't marked it yet. Well, I put a sticker.

THE CLERK: Okay. 1.

Q. (BY MR. HAMPTON) I'm going to show you what's been marked Plaintiff's Exhibit 1. See if you recognize it.

MS. STEWART: May I see that or is –

MR. HAMPTON: Yes, you will if he identifies it.

A. Yes.

Q. (BY MR. HAMPTON) Is that your handwriting?

A. Yes.

Q. Do you know what it is?

A. Yes.

Q. Is that a note to yourself?

A. Yes.

[149] Q. Okay. I'd offer the note. Plaintiff's Exhibit 1.

MS. STEWART: Okay. No objection.

THE COURT: Plaintiff's 1 is received without objection.

MS. DETTMER: Do you have a copy?

MR. HAMPTON: (Moving head up and down.).

Q. (BY MR. HAMPTON) You also wrote a letter to the Texas Department of Corrections before you saw Mr. Panetti; isn't that true?

A. Yes.

Q. And in that letter, you told them that you would need to be able to – in order to conduct a reliable examination that you'd need to observe Mr. Panetti closely and adequately for a period of several hours, true?

A. Yes.

Q. And you stayed for about an hour?

A. About an hour with him.

Q. Is it important to spend more time in order to make a more reliable evaluation?

A. Well, I can't answer that "Yes" or "No." I mean, it would be a good idea to be able to spend maybe three to four hours talking with an individual. That was my plan. But things ended at approximately an hour because they weren't going anywhere.

Q. He didn't attempt to leave the room?

[150] A. What did you say?

Q. He didn't attempt to leave the room, did he?

A. I don't think so, no.

Q. He remained in the room?

A. Yes.

Q. He didn't stand mute?

A. He didn't?

Q. Stand mute? Say nothing?

A. Oh, no.

Q. He responded in some fashion to your questions?

A. Well, let's say he responded. I'm not sure it was always to my questions. But he was – he talked most of that hour, yes.

Q. During your interview, you asked him, why are you in prison, and he said, in order to preach the gospel of the living king, didn't he?

A. Yes.

Q. So he answered your question, didn't he?

A. That question, I think he did.

Q. Okay. You asked him, you are on death row right now. Why? And he said, they don't want me to preach the word of God, right?

A. Right.

Q. So he answered your question then, too, didn't he?

A. Right.

[151] Q. Did you share all of the information that you had with Dr. Anderson?

A. As far as I know.

Q. Okay. And are you confident that she shared all of her information with you about Mr. Panetti?

A. Again, as far as I know.

Q. You're competent about that?

A. Am I confident about that?

Q. Yes. Do you think that Dr. Anderson withheld any important information about Mr. Panetti to you?

A. Well, that's two things there. One, as far as I know, we shared everything. Now, whether anything was withheld or not, I don't know, but it certainly wouldn't have been intentional.

Q. Well, she wouldn't withhold anything extremely material or significant about Mr. Panetti to you, would she?

A. I wouldn't think so.

Q. Okay. You reviewed the execution packet?

A. Yes.

Q. Exhibit 6. And you noticed that, first, he says that he does not desire a will?

A. I recall that.

Q. And then, he writes in his own handwriting, I desire a will?

A. Yes.

Q. He lists his spiritual advisor as Jesus Christ, Holy [152] Spirit, God, in the blank that's meant for the chaplain, or the priest, or minister?

A. I recall that.

Q. Okay. Then, he checked, I do not desire a will. Do you remember that?

A. Yes.

Q. And then, he checks all three boxes – he initials all three boxes that his disposition of his estate is too complex for a simple will, that he has an existing will, and that he needs the services of an attorney to write a will. Do you remember that?

A. I do.

Q. Okay. Then, he checks, again, yet, another sheet that he does not desire a will, right?

A. As I recall, there are inconsistencies in what's checked and what's written there, yes.

Q. And the religious orientation section, he identifies himself as preacher of, quote, good news. And that the following individual is my spiritual advisor, Jesus Christ is

Holy Spirit, God, again, the spiritual advisor being the priest, or whoever. Do you remember that?

A. Yes.

Q. And there's nothing in this packet that indicates that he knows why he is to be executed, right?

A. I would agree with that.

[153] Q. Okay. If you go over some of the letters that he wrote in Respondent's Exhibit 4, April 6th letter to his parents, he writes Karin, the visitor from Switzerland, quote, took it upon herself to arrange travel with a devout witch and the young oh 36-year-old man is one who – the one whom promotes this Mark Robinson has shot me with a blow gun darts, threw boiling water on me, and has led a group of devil worshipers whom caused me to lose a lot of skin on my face from the chemicals they spray on me. So please e-mail, call her say, no, I shall not come out to visit because of the witches, exclamation mark.

Would you consider that a normal socially appropriate thought?

A. No.

Q. Okay. Later in the letter, he says, there is no brotherhood of common death row inmates. There are enemies here of God's country that I oppose, and I shall not join with them. I hope she understands I want to see her, but the spirit of God says not to compromise with evil.

Do you think that's a normal, socially appropriate thought?

A. I don't think so.

Q. April 9th letter to Peter writes that, quote, I am under a lot of attack by the dungeon and dragon Columbine High School type. So artwork is difficult to do twas a blessed time when [154] I did your portrait, a peaceful day, very little quiet time here. Much, much evil ones whom do not repent. So sad.

Would you agree that that's not a normal, socially appropriate thought?

A. It's an unusual kind of a thought.

Q. Well, in his letter – three-page letter in this – in Respondent's 4 is the letter to Karin, which he tells her, quote, each day and night, I contend with these anti-Christian forces in prayer. Yet, when they spray mix chemicals and laugh, I just turn them over to God. Now I think of the weeping icon at – icon at a Greek orthodox at Blanco, Texas. What a time that was to see the weeping icon the preparation, et cetera, to be allowed into the area of the weeping icon.

Is that a normal, socially appropriate thought in your opinion?

A. No, I don't think so.

Q. In the April 5th letter to Karin, he writes – and I'm skipping ahead. But it's no mail on Friday or Saturday and people who assumed I received a great bunch of new pen pals assumed incorrectly. I have not one more new regular pen friend, a Navy pilot wants to visit and I said in uniform would be good for folks, people to see he is four years my junior.

That's – would you agree that that's not a normal, socially appropriate thought?

[155] A. It's an unusual thought.

Q. All right. Yet, you wrote in your report to Judge Ables that these letters reflected normal, socially appropriate thoughts. Isn't that what you wrote?

A. I'm referring to other parts of the letters than what you've been reading.

Q. Well, did you read the letters from the recipients?

A. I don't recall letters from recipients. Do you have some letters from recipients?

Q. No. But my question is, how can you tell if they're appropriate or not if you don't know what letters he was responding to?

A. Well, it's a judgment call, I guess.

Q. You spoke with Captain Miller, right?

A. Yes.

Q. Before or after you interviewed Mr. Panetti?

A. After.

Q. So you hadn't decided at that point whether or not Mr. Panetti was competent after your interview, right?

A. Well, I mean, I was still gathering data.

Q. Okay. You hadn't come to any conclusion that he was competent after you had interviewed him?

A. I hadn't come to any final conclusion, no.

Q. Okay. And Captain Miller calls him "preacher man"?

A. He didn't call him that. He said that Mr. Panetti is [156] called that on the unit.

Q. How long did your conversation with Captain Miller last?

A. I don't know. Twenty minutes, maybe a half an hour, somewhere along in there.

Q. All right. You took notes, didn't you, on – from your conversation with Captain Miller?

A. I don't recall.

Q. Do you know whether Captain Miller knows the standard for competency to be executed?

A. I don't know.

Q. Do you know how much experience he has in evaluating people with schizophrenia?

A. I don't know.

Q. Do you know what level of education Captain Miller has obtained in order to make any sort of a competency evaluation?

A. I don't know.

Q. Does he know how to test for malingering?

A. I really don't know.

Q. How did Captain Miller determine Mr. Panetti rationally, as well as factually, understood he was going to be executed?

A. You'd better ask Captain Miller. I don't know.

Q. You're not claiming that he's qualified for making that kind of determination, are you?

A. I'm not claiming that he would represent himself as a professional qualified to do that sort of thing.

[157] Q. You also reviewed the affidavits of Dr. Cunningham and Professor David Dow, right?

A. Are you referring to Dr. Cunningham's report?

Q. Yes. And the – your report lists the items that you have reviewed, that you told Judge Ables you reviewed. And one of those items which you've listed, besides the review of letters, Major Miller, you also wrote that you looked at the motion to determine competency to be executed and then, the motion seeking an order setting out protocol for conducting a reliable competency evaluation of Scott Panetti. Attached to that motion were two affidavits, one from Professor Dow and the other from Art Cunningham.

Are you saying you don't remember ever seeing Professor Dow's affidavit of his encounter with Mr. Panetti?

A. What I'm saying is I don't recall that name. I mean, I have reviewed all of those materials, but I don't remember that particular name.

Q. I noticed that your list of materials that you reviewed go back only as far as 11-6, 1992; is that right?

A. If that's what it says, that's what it was.

Q. Okay. You don't recall reviewing any records from 1981 to 1992?

A. I don't recall that. No.

Q. Do you recall Dr. Arambula's 1997 report?

A. Well, I have read a report from Dr. Arambula.

[158] Q. All right. That's not listed, actually, in your report to Dr. – I mean, to Judge Ables, is it?

A. Do you want me to check and see or –

Q. Well, I've checked it out. I can tell you –

A. Well, I'll take your word for it.

Q. Okay. But you've read Dr. Arambula's report at some point?

A. I have.

Q. Okay. And you saw the interview of Mr. Panetti in February '97 for two and a half hours, right? Do you remember that? Do you not remember anything –

A. You want me to read his report or –

Q. Yeah. I'm –

A. I don't recall how many hours he saw him.

Q. Let me – I'll skip right ahead. It seems like I'll need to.

You don't really remember too much from that 1997 report here today, do you?

A. I remember reading it. And I remember that Dr. Arambula was concerned about Mr. Panetti, and I don't know how many hours he talked to him, or anything like that.

Q. Well, I'm going to offer Dr. Arambula's report into evidence now. I think we've got an agreement to do that.

I'll ask you to take a look at Plaintiff's Exhibit 2, and see if you recognize this as Dr. Arambula's report – as a [159] copy of Dr. Arambula's report.

A. That looks like it.

Q. Same one you reviewed?

A. It looks like it.

Q. All right. Offering Plaintiff's Exhibit 2 now.

MS. STEWART: No objection.

THE COURT: 2 is received without objection.

Q. (BY MR. HAMPTON) I'll let you have that exhibit. You can read off of it. Just look that over for one brief minute and I'll ask you: From that report you can see that he interviewed Mr. Panetti in February 1997 for two and a half hours?

A. Yes.

Q. He also reviewed Panetti's medical files from Starlite Village Hospital, Kerrville Hospital, the VA Waco Hospital, Tomah VA Hospital, and Cumberland Memorial Hospital, right?

A. Yes.

Q. And you knew that Panetti was first hospitalized in 1981 from that report?

A. Yes.

Q. And by 1986, he was hospitalized, again, after suffering from delusions and hallucinations, right?

A. Right.

Q. He buried his family's furniture that year and believed that the devil was in the furniture, right?

[160] A. Right.

Q. So as early as '86, Panetti's schizophrenia is being expressed in religious terms, right?

A. Well, yeah. Well, he was diagnosed then with chronic undifferentiated schizophrenia.

Q. A diagnosis you don't disagree with?

A. I have no basis to agree or disagree with it.

Q. You noted that Mr. Panetti had visitors there at the prison?

A. I recall that he did, yes.

Q. And you noted all their names?

A. I don't recall all the names, no.

Q. You never spoke with his family?

A. That's right.

Q. You never spoke with his friends?

A. That's right.

Q. You never spoke with his visitors?

A. Did not.

Q. You never looked at Panetti's cell?

A. Did not.

Q. Or examine his bibles?

A. No.

Q. You didn't list Dr. Wolfgang Selck as a collateral source in your report to Dr. Ables, did you? It's not on here.

A. Evidently not.

[161] Q. Or Dr. F.E. Seale, right?

A. No. I have seen his report. I do remember that. But I'll take your word as not listed there.

Q. Okay. But so, you did see Seale's report?

A. Wait a minute. Say that name one more time.

Q. Seale, S-E-A-L-E. There's another doctor named Simes, in case you're –

A. I saw that.

Q. Okay. So you know that he, along with Dr. Seale, independently believed him to be sincerely suffering from schizophrenia?

A. Yes.

Q. Okay. Now, you wrote in your report to Judge Ables, and have said here today, that his letters contain text which reveals that Mr. Panetti is able to form and verbalize normal socially appropriate thoughts when he chooses to do so. And I want to focus on that last phrase. Chooses to do so or is able to do so?

A. It may be some of both.

Q. All right. Okay. And you recognize that schizophrenia is a brain disorder?

A. Yes.

Q. Okay. A brain disorder isn't a choice, is it?

A. No.

Q. Your conclusion seemed to assume that his inappropriate [162] responses were due to some conscious choice of his. Is that a fair statement, that that was an assumption?

A. I think at times, yes.

Q. Okay. Your conclusion kind of assumes that he's rational there, fair enough?

A. I think at times, he's capable of expressing appropriate thoughts and ideas, yes, if that's rational.

Q. Well, that's – I'm saying that you made that assumption, though. What is your basis to differentiate between a conscious choice of his to do that as opposed to a symptom of a brain disorder that makes him unable to do that? Where's the distinction?

A. Well –

Q. Other than just you sort of eyeballing him?

A. Well, it really wasn't based on the eyeballing of him. It was based on some parts of these letters, which we just went through and talked about.

Q. Okay. Parts of the letters. Captain Miller –

A. Yes.

Q. – right? Okay. I take it that you felt like spending more time with him would be unproductive?

A. It – yeah, it would have been.

Q. Didn't he agree to take a psychological test if – as he referred to him, with Marine Corps Gross, or his parents agree?

[163] A. He indicated that he might be willing to do that if that was – if he was told to do that by Mr. Gross.

Q. Okay.

A. It was my clear understanding that he'd already been told to do that.

Q. He'd already been told to do what?

A. To cooperate in the evaluation.

Q. Okay. Who do you think told him that? Do you know?

A. Mr. Gross.

Q. Are you assuming that or do you know that?

A. At the moment, I don't recall exactly what but it was – I think it was more than a mere assumption.

Q. You don't dispute that while Panetti, in your eyes, might have been competent six months ago doesn't mean he's competent here today, right?

A. I'd have to agree with that.

Q. All right. And even in your report, you never said that Mr. Panetti had a rational, as well as factual, understanding of the reason why he is to be executed?

A. No, I've never said that.

Q. All right. Pass the witness.

RE-DIRECT EXAMINATION

BY MS. DETTMER:

Q. Mr. Parker, I just want to clarify a couple of things, Doctor.

[164] Your conversation with Major Miller, was he in any way, shape or form holding himself out to be an expert?

A. Oh, no. No.

Q. He was just giving his general impression based on his interaction with Mr. Panetti?

A. Exactly. His observation based on years of experience, working with folks in prison, absolutely, and lots of observations.

Q. And you didn't rely on his opinion as an expert, did you?

A. Of course not.

Q. It was just one of many factors that you considered in reaching your conclusions?

A. I paid attention to it and considered it, yes.

Q. And, Doctor, you were actually appointed by the trial court, weren't you, in this case?

A. As far as I know, yes.

Q. A person with a brain disorder with schizophrenia, do they have choices?

A. Do they have choices?

Q. Can they make choices?

A. Oh, of course.

Q. Can they make decisions?

A. Of course.

Q. Is it possible that a person with schizophrenia can fake or exaggerate their symptoms?

[165] A. Certainly.

Q. Do you think Panetti has any kind of motive in this case to exaggerate or fake his symptoms? Do you think execution –

A. Well, I don't know that he is for sure, or anything, but I mean, he probably doesn't want to die. Most people don't. Most people don't want to be executed.

Q. Does hyper-religiosity make a person incompetent?

A. No.

Q. Can a person believe in God, and the Holy Spirit, and Jesus Christ, and still understand that they're going to be executed and why they're going to be executed?

A. Of course.

Q. Now, in reference to the letters that he read to you about the Dungeons and Dragons and the commotion that was going on around him and his cell, do you – are

you aware of the fact that people actually play those games in and around Panetti?

A. No. As a matter of fact, I'm not.

Q. So if somebody were to testify that they were, in fact, inmates who played the games of Dungeons and Dragons around him and that disturbed him, that would be a logical thing for him to share in a letter, would it not?

A. It would be an accurate report, yes.

Q. And it's not unusual for someone who is religious to be disturbed about satanic activity, which some would associate with Dungeons and Dragons?

[166] A. Often times.

Q. And, ultimately, Doctor, your inability to form an ultimate conclusion to know for sure that Panetti is competent and that he absolutely understands why he's going to be executed – the reason that you can't make that decision is because he was uncooperative in your interview; is that correct?

A. That's basically it. He wouldn't answer the questions.

Q. And that makes it rather difficult for someone in your position?

A. Makes it real hard.

Q. Okay. Pass the witness.

RE-CROSS EXAMINATION

BY MR. HAMPTON:

Q. In your report, Doctor, to Judge Ables, you said that Captain Miller said that he knows what's going on, right?

A. Do you want me to look for that and confirm it, or shall I take your word?

Q. Well, go by your memory. I mean, what did you gather from Captain Miller other than Captain Miller's opinion that he knows what's going on?

A. Well, that would have been it and in the death packet.

Q. Mr. Panetti told you, when you asked him, you're on death row right now, why, and he answered to you, they don't want me to preach the word of God, right?

[167] A. Right.

Q. Would you agree that if he is telling the truth, if that's a genuine reflection of his delusion as to why he is on death row, you'd agree that he's incompetent to be executed?

A. If that's the only thing that he is capable of understanding, I would agree with that.

Q. All right. You read Article 4605 of the Code of Criminal Procedure, right?

A. Is that the one that refers to –

Q. (Moving head up and down.)

A. Well –

Q. Competency to be executed?

A. I read through it as a layperson.

Q. Well, the article refers to reports of the experts. You and Dr. Anderson wrote a joint report, right?

A. We wrote a joint report, yes.

Q. With a singular opinion, right?

A. Right.

Q. And who really wrote most of that, or all of it?

A. It was pretty much of a 50/50, maybe a little more on my part.

Q. Okay. How much did you bill?

A. How much did I bill?

Q. Yes.

A. The last ledger amount I can recall was somewhere around [168] $10,000.

Q. And that was about $360 an hour, wasn't it?

A. That's exactly $360 an hour.

Q. You went down on the 24th of that month to see Mr. Panetti, right?

A. Is that the day we saw him? We would have gone down on the 23rd, most likely.

Q. I think you – your report says you saw him on the 25th. So –

A. No. We saw him on the 24th.

Q. Okay. So you went down on the 23rd, right?

A. Right.

Q. And you stayed with Mr. Panetti for about an hour?

A. That's right.

Q. And the Court paid for the whole day, didn't it?

A. Right. Well, that's kind of misleading the way you're asking me. I mean, we were there most of the day in the penitentiary. We were not with Mr. Panetti all day.

Q. All right.

A. All right. When was the last time that you and Dr. Anderson agreed or, rather, disagreed about an evaluation of someone?

MS. DETTMER: Your Honor, I'm going to object. I'm not really sure how this is relevant.

THE COURT: Well, he's just trying to show bias and [169] interest. I don't – I'll overrule the objection. You may answer.

A. Well, the last time we disagreed was when she was wrong. I don't recall when.

Q. (BY MR. HAMPTON) How do you spend your clinical days, your days with your patients? What kind of clientele do you have?

A. Well, I mean, some days I'm seeing patients, and some days I'm in jails, and some days I'm in lawyer's offices, and so on. When I'm seeing patients, I'm, you know, in the office, talking to them.

Q. What journal articles did you review regarding competency to be executed?

A. Well, I don't recall having reviewed any journal articles real recently here. And when I started doing this work, I –

THE COURT: This is re-redirect.

MR. HAMPTON: All right.

MR. HAMPTON: I'm really done. Thank you.

MS. DETTMER: Nothing further, your Honor.

THE COURT: You may step down.

* * *

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[170] your full name, and spell your last.

THE WITNESS: Steven Miller, M-I-L-L-E-R.

STEVEN MILLER, called by the Respondent, duly sworn.

DIRECT EXAMINATION

BY MS. WEAVER:

Q. Good afternoon, Mr. Miller.

A. How are you?

Q. Have you been in the courtroom today and listened to the testimony?

A. Yes, ma'am.

Q. Okay. Just as an initial matter, there's been some reference to your title as Captain. Would you clear that up for us and give us your title?

A. My correct title is Major of Correctional Officers.

Q. Okay. And where are you presently employed?

A. I'm employed at Texas Department of Criminal Justice, Polunsky Unit.

Q. And how long you been employed there?

A. I've been employed with the agency for 13 years and at Polunsky Unit for the last year.

Q. What are your current duties at the Polunsky Unit?

A. Major of Correction Officers, he is the highest ranking uniformed security officer. He oversees the daily supervisory functions on the unit. Daily functions include making sure that the everyday functions of the unit are being met, [171] security-wise. We also initiate reports, documents, rules and regulations that pertain to that particular facility.

At the time when I was over death row, we – it also included the in-processing of new death-row offenders onto the Polunsky Unit; the preparation of execution packets; and the escorting of offenders scheduled to be executed on a particular date.

Q. Okay. And could you explain to the Court what exactly an execution packet is?

A. Execution packet is a state document that is used – two weeks prior to an offender's execution date, he is

brought into the office. It basically outlines or prepares the offender's final situation. He sets up his witnesses that he wants to view the execution. If he has any property that is outside of his control that he would require a will, lawyers, their address, telephone numbers, in case we need to contact them; who or how the body, in case the execution takes place, is going to be disposed of. Is it going to be picked up by a particular family member, or is it going to be left in the hands of TDC to bury on their own property.

We also talk about how he's going to dispose of his personal property, if it's going to be donated, or if a family member is going to pick up the personal property, his – any kind of money that he has in his trust fund account, where is it going to go to. Final meal request, what he's going to [172] request the day of his execution that he wants to eat, and plus clothing size. There's also a page dealing with the chaplaincy. It talks about his denomination, any kind of aliases that he goes by, or nicknames that he goes by, and if he wants any spiritual advisor.

Q. All right. And what is your standard procedure when you prepare an execution packet for a particular inmate?

A. Well, what we do on a day of it?

Q. Uh-huh.

A. All execution packets are prepared fourteen days prior to the offender's execution. Like I said earlier, the offender's escorted at the time to my office on what we call a Twelve Building, which is death row on the Polunsky Unit. Brought into the office, usually it's going to be myself, a lieutenant, and we'll have two correctional officers that have escorted the offender down.

To alleviate a lot of the – I say pressures that the inmate might have because being two weeks out from his execution. We remove the hand restraints. He sits up next to the desk, right across from me, and we try to create a relaxed atmosphere where, you know, he can relax because of the fact what he's preparing. What we do is – and the execution packet is not done in any particular order, even though it has an A, B, C, D.

We start out, I'll read each page by page. We'll do [173] one page at a time. I'll read it to him, ask him if he understands. I'll give him a pen. I hand him that piece of paper. He'll write it out, and we'll do that for every page. Once we complete all that, then we'll verify it, make sure that he understands and that everything is correct.

Q. And then, do you type up a form from that?

A. Yes, ma'am. All the information that the inmate has written on the execution packet, we hand it over. It is transferred onto computer and then, it's computer-generated. Once that computer generation is done, we hand it back to the offender, he reads over it to make sure everything's true and correct and there's no mistakes. Once that's all done, he's going to sign, it's going to be witnessed by myself and the lieutenant. And once that's – everything is complete, we'll fax that copy to Huntsville before noon of the execution date and to Mr. Dretke's office.

Q. Okay.

A. Okay.

Q. And did you prepare Scott Panetti's execution packet?

A. Yes, ma'am.

Q. And when did you do that?

A. I believe January 22nd of this year.

Q. Okay. And in preparing his execution packet, did you follow the standard of procedure that you just described?

A. Yes, ma'am.

[174] Q. Did Mr. Panetti fill out the form himself and then, go over it with you?

A. Yes, ma'am.

Q. And he filled out that form in your office?

A. Yes, ma'am.

Q. And who all was present when he filled it out?

A. Myself and, I believe, Lieutenant Richey was also there.

Q. Okay.

A. I can't think of the correctional officers that were probably in the office at the time.

Q. Okay. And did he eventually complete the form?

A. Yes, ma'am. We finally completed the form.

Q. And then, were you able to complete a computer-generated form?

A. Yes, ma'am, we did. We ran into some problems when it came to a particular area of that execution pack.

Q. Okay. Well, once those forms were completed, what did you do with them?

A. Once we completed them, we forwarded them to Huntsville to Mr. Dretke's office.

Q. Okay. And did you also keep a copy in your office?

A. Yes, ma'am, we keep a copy. It becomes the official records, and it goes in the inmate's file.

Q. Oak [sic]. If you'll take a look, I believe there will be a document identified as Respondent's Exhibit X there – I mean, [175] Exhibit X. What am I saying? I'm sorry. 6. If not, I have some more copies. Did you find it?

A. Yes, ma'am.

Q. All right. Do y'all have a copy?

MR. GROSS: (Moving head up and down.)

Q. (BY MS. WEAVER) If could you take a look at that for me.

A. Okay.

Q. And do you recognize that?

A. Yes, ma'am.

Q. Is it a fair and accurate representation of the forms that you filled out –

A. Yes, ma'am.

Q. – for Mr. Panetti?

A. Yes, ma'am. I'd say so.

Q. And the form that he filled out, as well?

A. Yes, ma'am.

Q. Your Honor, we'd move to have Respondent's Exhibit 6 admitted into evidence.

MR. GROSS: No objection.

THE COURT: Received.

Q. (BY MS. WEAVER) Okay. The first question I have is, was Mr. Panetti cooperative with you during the meeting to prepare his execution packet?

A. Yes, ma'am, for the most part, he was.

Q. So did he follow your instructions?

[176] A. For the most part, yes, ma'am, he did.

Q. And did he answer all of the questions on the form?

A. Yes, ma'am, he did. We ran into a situation in regards to the will part of the – on Section B.

Q. Okay. On B, one through four?

A. Yes, ma'am.

Q. Could you explain what happened with regard to that?

A. When we sat down, explained it, and, like I said, we try to keep a lax atmosphere due to the fact of what's transpiring.

Q. Uh-huh.

A. Its hard to put yourself in the position unless you're actually in that position. We started going down, I read off everything, explained what is required, what he

needs to do. As far as the witnesses, I had no problem with that. When we came down to spiritual advisor, he basically said Jesus Christ is his spiritual advisor. He doesn't need anybody else.

Section B in regards to worldly possessions, he talked about how he had – he had land in Montana, Wyoming, something to that effect, and that he probably was going to need a will. And we tried to, you know – and I'm not a lawyer, and never claimed to be one, but I told him, you know, most of the time, if you have relatives that are alive that you usually leave in possession of that. He said that he was going to break it up between his brothers, or something to that effect. He wanted [177] to break it down and give them each a section, something to that effect.

We went into – that's where he went ahead and started signing all the different sections in there.

Q. Can I interrupt you just a second?

A. Sure.

Q. And ask you, if, in fact, an inmate does express a desire to have an attorney –

A. Right.

Q. – does TDCJ provide that for him as far as preparing a will?

A. Yes, ma'am. And we did this for Offender Panetti, too, it this case.

Q. Okay.

A. Inmates that require or request a will –

Q. Uh-huh.

A. – we will contact State Counsel for Offenders, in which time they will make an appointment and come out, and they will discuss the procedures with the offender in regards to him creating a will. And that happened on this occasion, too.

Q. Okay.

A. Okay.

Q. Is this the document that you – that is here, I noticed there are several duplicate typewritten copies or computer-generated copies, if you will?

[178] A. Right.

Q. And then, there's handwritten copies?

A. Right.

Q. There's one part of the document that indicates that he desires a will, and then, later, he – there are initials saying that he doesn't. Could you explain the circumstances surrounding that?

A. Well, when we went from the handwritten portion of the execution pack to the computer-generated, while we were sitting there, Offender Panetti made a request to me and what his request was – what he got into, we had a little down time between the two. He went in to talk about how he is a cowboy –

Q. Uh-huh.

A. – from Wyoming or Montana. I can't recall. And what he was requesting was three things.

Q. Okay.

A. He requested that he wanted a pair of cowboy boots, a necklace with an anchor, and a wedding band, because he was, supposedly, supposed to get married to Ms. Eberhart by proxy, I believe it was, was supposed to get married. Basically, I explained to him the procedures, no, he wasn't going to get all of that, and then, he wanted to make a deal.

Q. What do you mean by that?

A. He wanted to bargain with me that with the fact that if I [179] gave in to his request about giving the ring, the necklace and the cowboy boots, that he would sign where he doesn't desire a will so we wouldn't have to call out State Counsel for Offenders.

Q. Okay.

A. That went on for a little while. And he made the statement about the cowboy boots a little bit more, and he was talking about how his medical boots hurt because he had a nail, supposedly, that was sticking him and that if he – he wanted to go out with a pair of cowboy boots. If he was going to be executed, he wanted to go out in comfort. And so, he made that statement. And he said if he couldn't wear what he requested, he would go out naked.

Q. Okay. And so, then, can you – does that explain why there are several –

A. Yes, ma'am.

Q. – copies of different initials?

A. Yes, ma'am.

Q. Because – could you explain why exactly how that happened?

A. Well, if we look at – and I'm looking at three – the very first one, where he's writing in his own handwriting and he signs all three, one, two and three, on the – in regards to an attorney, and a will, and stuff like that, he did that. We tried to explain it to him, again, because after we [180] computer-generated, he's going to have to initial off again.

Q. Okay.

A. Okay. Once we went ahead and did the computer generation and handed it to him and showed it to him, that's when he wrote in, Jesus Christ, Holy Spirit, God, and I desire a will. That's the first copy that we actually sent to Huntsville.

Q. Okay.

A. And that's when we called – contacted State Counsel for Offenders. When they came out, after they talked to him and explained to him that he didn't qualify for a will, they went ahead and generated one more, and that's where he signs, I do not desire a will and that's the – added to. So that kind of explains why we have so many different copies of this.

Q. Because, so my understanding is, each time you showed him a copy, if he didn't agree with everything?

A. He would write something in there and we'd have to go –

Q. Go through the process?

A. Right.

Q. Okay. So in the form containing handwritten notations rather than typewritten or computer-generated notations?

A. Right.

Q. That form Mr. Panetti filled out himself entirely?

A. Yes, ma'am.

Q. And he's the one that designated how much was in his trust account?

* * *

[181] A. We gave him a – we gave him a copy of his trust fund account. We showed him. At the time of January 22nd, 2004, the date of his execution, he'll fill out another one, signing over whatever is left, and we'll give him an updated version the day of his execution. So on the 22nd, he had $50.49, which he was planning on forwarding to Ms. Louise Panetti.

Q. Okay. So he filled that out about who he wanted this trust fund to go to?

A. Yes, ma'am.

Q. And on the form designating his witnesses under A, one through five?

A. Yes, ma'am.

Q. He filled that out?

A. Yes, ma'am.

Q. And he made the notations about who those people were?

A. The notations about who they were.

Q. On page – on the front page of – I guess it would be –

A. Shows friend, mother, father.

Q. Beside it on the fourth page is actually noted page 1, down at the bottom.

A. Okay.

Q. It says M.C. Gross, attorney of record, Yvonne Pearl Panetti, Mom, Louise J. Panetti, Jack. Do you see that where I'm talking about?

A. In his own handwriting.

[182] Q. Yes.

A. Yes, ma'am.

Q. And those are all his own personal notations and designations of who those people are?

A. Yes, ma'am.

Q. Okay. So did he appear to understand the questions on the form?

A. Yes, ma'am. We went over a lot of questioning about it in regards to if he didn't understand. But, like I said, it was explained to him and if he had any questions, he wasn't rushed. He was given a lot of time to complete and fill it out. But as far as him not knowing what is going on, no. He understood what was going on because he filled it out in his own handwriting.

Q. Okay.

A. And how he wanted it.

Q. And he was cooperative other than when he attempted to negotiate what he wanted –

A. Yes, ma'am.

Q. – to wear?

A. He was cooperative. We had a conversation in regards to, you know, him being a cowboy, and how he wanted to go out. He knew how he basically said if he was going to get executed, he wanted to go out comfortably.

Q. So he was able to articulate in his own – for his own [183] behalf, his own benefit?

A. Yes, ma'am. I'm not an expert in it, but I know what it is to talk to a man face-to-face and know that his answers are true and genuine.

Q. Okay. Did you – and in the course of your duties there on – at the Polunsky Unit, had you had any other dealings with Mr. Panetti?

A. Yes, ma'am. I've dealt with him on numerous occasions. What people – unless you actually work death row, or been around death row, you don't understand. And it's hard to understand unless you've been down there.

Inmates that receive an execution date per se, when we're notified by the Attorney General's Office of a date, what we do is they come down to the office. I personally notify them of their date. I also notify that they're going to be moved to a section that we have designated particularly for inmates with execution dates. And there's 14 cells in that section. It could be 14 inmates pending execution, or

it could be half a dozen. It just – it fluctuates depending on the court system.

Once they're down there, we make particular effort to go down there and check on their needs and their mental capacity every day. We go down there, see that if everything is going all right. They have any questions, or complaints, or concerns that we may be able to help them. A lot of them, [184] if they're close to their date, they've got a lot of concerns in regards to witness or visitation list, who could come see them two days prior to the execution, the day of the execution.

Going to the commissary. A lot of times, they will drop to 75 every two-week span and just let them go spend. We've had inmates spend up to $500 in a week's period of time just so they can do that. Phone calls to the attorneys. You know, we go out of our way to show some compassion for them, but not jeopardize security in the meantime. So we go out of our way to make daily rounds over there.

Q. All right. And so during those rounds, did you have contact with Mr. Panetti?

A. Yes, ma'am.

Q. And did you converse with him on those occasions?

A. Briefly.

Q. And was he able to maintain a linear thought in your conversations?

A. It seemed as normal as me and you talking right now.

Q. Okay. Pass the witness.

MR. GROSS: May I proceed, sir?

THE COURT: Yes, sir.

CROSS-EXAMINATION

BY MR. GROSS:

Q. Major?

[185] A. Yes, sir.

Q. Panetti's been on death row since '95. You said you've been at Polunsky Unit only a year. Did I hear that correctly:

A. Yes, sir.

Q. So from the whole time Panetti's been on death row from '95 until sometime last year, you didn't see him at all. Would you agree with that?

A. Yes, sir. I agree with that.

Q. About when did you arrive at the Polunsky Unit?

A. I arrived on the Polunsky Unit September 2003.

Q. So about a year ago today, right?

A. Yes, sir.

Q. Now, how does the table of organization work there at Polunsky Unit? How many folks are there above you at Polunsky?

A. You have senior warden, assistant warden, then me.

Q. So you're number three on the table of organization from the top?

A. Yes, sir.

Q. Now, there's a lot of folks at Polunsky, both death-row and non-death row inmates, would you agree with that?

A. Right. Yes, sir.

Q. You've got a ton of folks that are housed at the Polunsky that are not awaiting execution, or not there on death row, then you've got a few folks there on death row, right?

[186] A. Yes, sir.

Q. About how many do you have on death row?

A. At the time I believe when I left death row was 432.

Q. So somewhere over 400?

A. Yes, sir.

Q. Now, how many folks are there between you being number three and being actual guys in the trenches, if you will, that are actually there, walking the death row area of Polunsky and the other units of Polunsky?

A. I've got one lieutenant – one captain, eight lieutenants, and I think about 16 sergeants, and then, your COs, your front-line supervisors or front-line officers.

Q. Now, the front-line officers, the COs, they have regular guards under them, correct?

A. No. They are it.

Q. So these are the guys you see in the gray when you walk up there to see someone?

A. We all wear gray.

Q. These are the guys in gray without any rank on their collar?

A. Right.

Q. Okay. Now, the number of folks you said that are there walking the unit, roughly, how many COs are there?

A. In death row I probably had approximately between 175, 200 officers.

[187] Q. And that's just on death row only, right?

A. That's just death row.

Q. And that's not including the other units there on Polunsky, right?

A. Talking about general population?

Q. Check?

A. Right.

Q. Now, you personally go around and inspect the whole Polunsky Unit daily, weekly or monthly, or do you leave that to your subordinates?

A. Are we talking about when I'm over death or over GP?

Q. Both.

A. Okay. I'm assigned to general population now. There's two majors on the Polunsky Unit. You have a general population major and you have a death row major.

Okay. You have two assistant wardens, you have a general population warden, and a death-row warden. Okay. So it's split down the middle.

When I was over at death row, my main concern was death row. I had 432 inmates that I'm in charge of and approximately 175 to 200 officers. So did I make my rounds when I was on death row on a daily basis, yes, sir, I did.

Q. And when you make those – how long were you over death row, by the way?

A. I was eight months.

[188] Q. So from September '03?

A. To April of '04.

Q. Until April of '04. Now, when you make those rounds, what exactly do you do?

A. Well, I make my rounds, I'm ensuring that my officers and inmates are complying with the rules and regulations established by the agency. Okay. I go over there and I talk to inmates, because inmates are good source of information. You know, they pretty much can tell you if a certain officer or a certain activity is not being conducted in accordance with policy.

I just make my rounds and make sure that we create an environment that is healthy and livable but, also, workable for the officers, too, and according to ACA standards.

Q. Now, these guys that are on death row, they're in a cell in lock-down, correct?

A. Right.

Q. By themselves, correct?

A. Right.

Q. And that's 23 hours out of the day, right?

A. Twenty-three hours a day.

Q. And one hour they're allowed out, correct?

A. Right.

Q. Now, would you agree with me that you've never gone to Panetti's cell and had an extended conversation with him?

[189] A. No. I've been to his cell.

Q. And sat down and had an extended conversation with him?

A. No. I never sat down with him.

Q. Extended conversation with him?

A. I've never sat down with Panetti and had a long, in-depth conversation. But I have talked to Panetti while he was in his cell.

Q. Have you gone inside his cell with him?

A. No.

Q. Okay. Have you looked at his –

A. Why would I go in his cell? I mean that –

Q. Have you look at his bible?

A. No, I haven't look at his bible.

Q. Have you looked at any notations he had in his bible?

A. No, I haven't. Why would I?

Q. Now, when you saw –

THE COURT: You'd do a whole lot better just answering the questions than trying to guess why they're asking them.

THE WITNESS: Yes, sir.

Q. (BY MR. GROSS) Now, when you say you briefly saw Panetti in response to counsel's questions earlier on direct, by briefly what are you talking about briefly?

A. When we were talking about that –

Q. Filling out the packet, the death packet?

A. I talked to him approximately maybe 20, 30, 35 minutes.

[190] Q. And when you saw Dr. Parker at Huntsville, how long did you talk to him?

A. I don't know, not very long.

Q. Five minutes, six minutes?

A. Maybe ten minutes, 15 minutes.

Q. Inside Panetti's cell itself, can you describe to us what's hanging in there, or what's in there at all, or have you just looked at it from the outside in?

A. I can tell you when I was back there, policy stated there would be nothing hanging on the wall so I wouldn't – there wasn't nothing on the walls.

Q. When you talked to Panetti, would you agree with me that you were not trying to determine his competency?

A. No. That's not my job to determine his competency.

Q. You were just filling out the form with him, right?

A. Right.

Q. Thank you, sir. No further questions.

MS. WEAVER: No further questions, your Honor.

THE COURT: Apparently from your testimony, there's no doubt that Mr. Panetti knew about an execution?

THE WITNESS: Yes, sir.

THE COURT: Did you ever have any conversations with him with regard to why he's being executed?

THE WITNESS: No, sir. That was never brought up, and I mean, we had a kind of unwritten rule. Their crime is their [191] crime –

THE COURT: I wasn't suggesting that. I just was asking it. All right. So no doubt in your mind he knew he was going to die?

THE WITNESS: Yes, sir.

THE COURT: All right. Any further questions?

MS. WEAVER: No, your Honor.

MR. GROSS: No, sir.

THE COURT: You may step down, sir.

MS. STEWART: We call Terri Hill, your Honor.

THE COURT: Let's just have a seat for a minute.

MS. STEWART: Sorry, your Honor.

THE COURT: No, no, not you. I want you standing up. Tell me what we have left.

MS. STEWART: We hope to put on this one last witness today, and then, we have two witnesses. That would leave two witnesses for tomorrow, another person from TDCJ and our expert. He's unavailable till tomorrow.

THE COURT: And that is Dr?

MS. STEWART: Anderson.

THE COURT: Anderson.

MS. STEWART: Yes.

THE COURT: All right. If you'll come forward, please, ma'am. This is Mrs. Sims. She's going to administer an oath to you.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

SCOTT LOUIS PANETTI	)	Docket No. A 04-CA-042 SS [/s/ JK] DEPUTY
vs.	)	Austin, Texas
DOUG DRETKE	)	September 8, 2004

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE SAM SPARKS
Volume 2

(Filed Nov. 15, 2004)

* * *

[4] MARY I. ANDERSON, called by the Respondent, duly sworn.

DIRECT EXAMINATION

BY MS. DETTMER:

* * *

[5] Q. (BY MS. DETTMER) Can you tell us what you do, Dr. Anderson?

A. Sure. I'm a licensed physician in the state of Texas, and I have a private forensic psychiatric practice.

Q. How long have you been licensed in Texas?

A. For over ten years.

* * *

[26] Q. When did you interview Mr. Panetti?

A. On March 24, 2004.

Q. Where was that interview?

A. At the TDCJ Polunsky Unit in Livingston, Texas.

THE COURT: I'm sorry. The date again, please?

THE WITNESS: March 24th, 2004.

Q. (BY MS. DETTMER) Can you tell us how the interview began?

A. Dr. Parker and I walked into the room, and Mr. Panetti said, do you believe in Jesus. We sat down, I started to tell him who Dr. Parker and I were, why we were there, and Mr. Panetti continued to talk about religious comments and asked about whether we believed in Jesus. I explained that we were court-appointed to evaluate him for competency to be executed, that what he said can be used against him. And he continued to make religious statements including he stated, you think you've come here for one reason, you're here because Jesus brought you.

Q. Okay.

A. Went on from there.

Q. Okay. Were you able to evaluate Mr. Panetti's competency based on that interview?

A. I did evaluate him the best I could, but I also looked at available information in the jail, in the prison, reviewed other records. So I have opinions based on that evaluation, but as far as a firm conclusion of whether he's competent to [27] be executed or not is not something I have a conclusion about.

Q. And why is that?

A. Mr. Panetti was not very cooperative with the evaluation. His responses were very complex, but they were not direct answers. So he would not directly state – when I asked him, have you been convicted of capital murder, he wouldn't answer that question directly. Or why are you being executed, he wouldn't answer that directly.

Q. Okay. Now, you're telling us that he was uncooperative. Can you give us any examples from your interview with him that indicates that it was a deliberate choice not to cooperate?

A. Yes. Mr. Panetti appeared to be, actually, very, very intelligent. He responded to questions in abstract ways, but that made a lot of sense. He told us that we were there to destroy, and basically discussed that he has accepted the Lord and that we need to accept the Lord and –

Q. Let me ask you this, Dr. Anderson. At any point during the interview, did you become frustrated at his refusal to answer questions?

A. Yes.

Q. And did you ask him why he would not answer your questions?

A. Yes.

Q. And can you tell us what he responded?

A. Yes. I asked him why he did not answer questions [28] directly. To give me a "Yes" or "No" answer when I asked him whether he was convicted of capital murder, and he responded, do unto others as you would have them do unto you. Do you remember the first question I asked you?

Q. Okay. Now, what was first question that he asked you?

A. Do you believe in Jesus.

Q. And did you respond to that question?

A. I did not.

Q. Did Dr. Parker respond to that question?

A. At some point, Dr. Parker did respond and said that we were Christians, but I never answered that question.

Q. Did Mr. Panetti know that you did not personally answer that question?

A. Well, he was there, yes.

Q. So when he said – when you asked him directly, why won't you answer my questions and he responded, do unto others as you would have them do unto you, what were you able to extrapolate from that?

A. Well, it sounded to me like he was saying, if I wasn't going to answer his question, he wasn't going to answer my questions.

Q. And would you consider that a logical organized thought?

A. Yes.

Q. And in your interview you talked about how Mr. Panetti continually brought up religious references?

[29] A. Yes, he did.

Q. In doing so, were those references – did they appear disorganized?

A. No.

Q. Can you explain?

A. Yes. For example, I asked him – or Dr. Parker actually asked him, why are you on death row? And he talked about for having that coin of Cesar. And he gave the description of people trying to tempt Jesus and trick him and whether they were going to have to pay their taxes or not.

Q. Uh-huh.

A. And Jesus' response was a comment of whose head is on this coin, give to Cesar what is Cesar's; give to God what is God's.

Q. Uh-huh.

A. And then, later – so I took that as he was saying we're trying to trick him. We're trying to destroy him. We're trying to trick him into answering this question if he answers this question.

Q. So even though he's answering questions with biblical references and biblical responses, they're on some level logical responses to your question?

A. Yes. And, actually, there was another reference later where we asked, before he began preaching, why was he on death row, and he said, ah, look at that coin, referring – it [30] seemed to me to, there we go again, trying to trick him, to say the reason he's being executed.

Q. Okay. So based on your evaluation of Panetti, overall did you find his thought process organized?

A. I think that his answers made sense and there were organized responses. He often went off on tangents and would appear to avoid responding by going into religious material that he had memorized, or start singing songs that he had memorized. So it's organized, but it's, also, tangential and avoidant and not direct.

Q. And based on your evaluation and your review of the records in this case, did you get an impression as to whether that avoidance was deliberate?

A. It appeared very deliberate.

Q. Did you ever ask Mr. Panetti if he understood why he was going to be executed?

A. I did.

Q. What was his response?

A. I asked him a number of times, but ultimately, he talked about his belief that people were wanting him to be executed for preaching. And I can quote that, if you'd like.

Q. So, essentially, he was telling you that he was being executed to prevent him from preaching the gospel?

A. Yes.

Q. In your opinion, does that render him unable to understand [31] why he's being executed?

A. No.

Q. Why not?

A. Well, I think one can have a belief that there is – everything has a purpose, and I think he may believe that he is now there for a purpose, which is to preach the bible, and that if he's executed, then he is being stopped from doing so. But his capacity to understand the bible, to understand history, ~~movies,~~ other things that he referenced, tells me that he has the capacity to understand the facts of why he's being executed.

Q. So, in your opinion, he has the mental capacity to understand that the reason the state is executing him is because he killed his in-laws; is that correct?

A. Yes.

Q. Do you believe that a diagnosis of mental illness is important to the determination of competency?

A. I think that it's relevant, but it doesn't either make somebody competent or incompetent. It's certainly relevant.

Q. It could be diagnosed schizophrenic or schizoaffective disorder and still be competent; is that correct?

A. Yes.

Q. So the bottom line is, in your opinion, you could not make a determination – an ultimate determination of competence in this case; is that correct?

[32] A. That's correct.

Q. But you can determine that based on everything that you've reviewed and based on your evaluation that he has the ability to know why he's being executed?

A. That's my opinion.

Q. Okay. I'll pass the witness.

CROSS-EXAMINATION

BY MR. HAMPTON:

Q. Dr. Anderson, my name is Keith Hampton. I'm going to try to ask you a few questions, and I'd like to see if you'd be willing – if you could answer the question "Yes" or "No," if you'd be willing to do so, and if you can't, say, "I can't answer that with a 'Yes' or 'No.' " Does that sound like a fair way to proceed?

A. Yes.

Q. Both you and Dr. Parker were strangers to Mr. Panetti when you saw him, true?

A. Well, I can't answer that with a "Yes" or "No." I have to –

Q. Okay. You'd never seen him before?

A. As far as I recalled, I had never seen him before. You told me today that I had, but I did not know that I had seen him before. So as far as I knew, we were strangers.

Q. And you're saying you don't remember now either?

A. No. I don't ever remember having seen him before. But if [33] Dr. Coons testifies that I was there, then I wouldn't doubt that.

Q. Okay. You've done a lot of competency examinations, competency examinations to stand trial, right?

A. That's correct.

Q. You're not board-certified in forensic psychiatry, true?

A. I am not.

Q. Okay. Your understanding of the word "understand" is that the person have a factual as well as rational understanding; is that right?

A. Well, that's the definition for competency to stand trial.

Q. Okay. Then, what understanding were you searching for when you observed Mr. Panetti?

A. Whether he understood the basic word "understand."

Q. Okay. Would that basic word "understand" be a irrational or a rational understanding?

A. I would expect it to be a rational understanding.

Q. Okay. And that's what you looked for?

A. Yes.

Q. Okay. But you don't have a conclusion on it today because you didn't get enough information from him, I take it, during that examination?

A. No, because he wouldn't answer the question directly.

Q. Wouldn't or couldn't?

A. Wouldn't. And, actually, he had a point. His view of he [34] has a purpose there is something that he can believe. I don't see that –

Q. You don't doubt the delusion that he believes he's on death row for – his purpose to be on death row is to preach the word of God?

A. I think that's an assumption to say it's a delusion. I think that there are a lot of people who may believe they have a purpose in whatever they're doing. That doesn't mean they don't understand why they were put there.

Q. Well, which is more likely? You reviewed his psychiatric records, didn't you?

A. I did.

Q. You know he was burying furniture before the offense even happened?

A. I saw that.

Q. That he has written bizarre letters to people, preaches day and night, bad hygiene, he wouldn't shave, he claimed he was a Nazarite. Does that ring a bell?

A. Years ago.

Q. Okay. This didn't happen like overnight. This wasn't a prison conversion. He's been having this religious delusion since 19 – since the '80s.

MS. DETTMER: Your Honor, I'm going to object at this point. There was not a question. That was him testifying as to the record.

[35] MR. HAMPTON: Well, I'm seeing that she's agreeing. She's nodding her head.

THE COURT: Let's do have a question.

Q. (BY MR. HAMPTON) All right. You remember all of that?

A. I remember in the records a lot of the things that you've just stated. When I saw him his hygiene was good.

And I'm not saying that he's not strange and there's nothing wrong with him.

Q. Would you disagree with the repeated diagnoses of him as a paranoid schizophrenic?

A. I don't have a diagnosis of him because he wouldn't cooperate. The records indicate many things and including rule-out of malingering, and including a number of folks who thought he appeared to be malingering. So I don't have a conclusion about his diagnosis, and I don't need to have one.

Q. Well, what you told the Court is, hey, he could just – this may not even be a delusion of him being on death row for preaching the word of God. It could very well be that this is just an ordinary belief system of somebody. Isn't that what you were saying?

A. I didn't say "ordinary." And you know what, I'm not answering these "Yes" or "No." So I guess I'll have to take back that I'll answer questions "Yes" or "No." I didn't say it was ordinary. I said that somebody can believe that they have a purpose and still be able to understand a factual basis [36] that is different from that purpose.

Q. What scholarly publications would you cite for competency-to-be-executed evaluations?

A. I would not give you titles or names of anything. I'm very bad at names.

Q. All right. Any journal articles you reviewed regarding competency-to-be-executed evaluations?

A. Just ten years of experience, hundreds of people, evaluating folks for mental illness, and knowing what the definition was by the court standard.

Q. You made your notes available to us, correct?

A. Yes.

Q. Your notes – do you have them there?

A. Yes.

Q. Okay. If I ask you something and it doesn't ring a bell, then feel free to go through your notes.

But in your notes, I see that you wrote that Dr. Parker asked Mr. Panetti, you could answer our questions if you chose to. And you wrote down that Mr. Panetti responded, I must obey the living Lord. Dr. Parker, you noted, asked, is the living Lord telling you not to answer our questions, and Mr. Panetti said yes. Is that correct?

A. That sounds right.

Q. Okay. And you also noted Mr. Panetti said the devil is trying to rub me out for preaching the word of Jesus Christ.

[37] A. That sounds correct, also.

Q. Okay. Now, about cooperation, you asked him to do a psychological questionnaire, right?

A. That's right.

Q. He said, I can, but I'll have to ask Marine Corps Gross first.

A. Uh-huh.

Q. Referring to his attorney, Mike Gross?

A. That's right.

Q. And later, he said, or my parents could tell me, right?

A. I remember him talking about his parents. I don't remember if he said that they could tell him to do the questionnaire.

Q. Well, but no questionnaire was ever administered to him by you or Dr. Parker?

A. That's correct.

Q. Okay. And he wasn't being uncooperative when he agreed to take the test?

A. He didn't agree. He said that he would have to check with his attorney.

Q. Have you reviewed the prison medical records, as well?

A. I did.

Q. Okay. I want to show you from four pages, which, unfortunately, are not marked. I pulled them out of another – I mean, the page numbers for your deal, but I'll show them [38] to you.

MS. DETTMER: Just give us a date on them.

MR. HAMPTON: They're all going to look like this, basically.

Q. (BY MR. HAMPTON) I'm going to show you four examples from his TDCJ records, and see if that looks like

something you reviewed. Specifically, I think they are classification records.

A. I reviewed hundreds of pages, and these were probably in there. I don't specifically recall these. But I will take your word that they are from his records.

Q. I'm going to offer Plaintiff's Exhibit 3, 4, 5 and 6.

MS. DETTMER: No objection, your Honor.

THE COURT: Petitioner's 3, 4, 5 and 6 are admitted.

Q. (BY MR. HAMPTON) Dr. Anderson, can you tell the Court the IQ, the classification gave to Mr. Panetti?

A. If this is EAIQ, if that means his IQ, then they have minus 60, which I don't know if that's what that means or not.

Q. You're looking at No. 3.

A. I don't agree that his IQ is less than 60.

Q. That's right. There's no way his IQ is 60.

A. I don't believe that his IQ is less than 60.

Q. Right. Or 60?

A. Or 60.

Q. In the other documents, as you'll see, reflect 60, one [39] says minus 60, under 60.

MS. DETTMER: Your Honor, I'm sorry. Can I have a copy? I don't have a copy of that exhibit, and I don't have one here either.

MR. HAMPTON: Yeah. I can show you.

THE COURT: I want to make sure I understood your answer. Your answer was you don't believe that his IQ is 60 or under?

THE WITNESS: That's correct.

THE COURT: All right.

Q. (BY MR. HAMPTON) I want to talk some more about lack of cooperation versus an inability to. You decided after the interview with him that he was deliberately being uncooperative with you, right?

A. I decided that that was how it appeared, yes.

Q. And that the basis for that inference that you're making that he's uncooperative is because his responses to you are indirect and inappropriate to your question?

A. No.

Q. Then, what objectively can you state to the Court that would lead you to conclude that his mental state is a deliberate choice rather than a manifestation of his mental illness?

A. Because he presented with good hygiene. He was controlling. He paused at appropriate points. He made very [40] good eye contact. And he told us that we weren't answering questions the way he wanted us to. He said, you want it from the horse's mouth, but when the horse speaks, you do not hear. You're not hearing it the way you want to hear it, and that's exactly right. He was not responding in ways that we wanted to hear. He was responding, instead, in ways that were quotes from the bible and things that would not give us the information to

make a final conclusion that he knows exactly why he's being executed.

Q. Why isn't this consistent with someone who is suffering from schizophrenia?

A. I'm not saying whether or not he has schizophrenia. He may. But that is not the question I was being asked.

Q. Okay. So you are making a conclusion about the state of mind of somebody who you know from the psychiatric records has diagnoses going back to 1981. And here today, you're saying you're making that conclusion without personally knowing or concluding whether or not he's suffering from schizophrenia?

A. The label is not the question I was asked. There are many diagnoses he's given, including questions about the validity of his psychotic symptoms that are throughout the records. He is a difficult person to assess and he –

Q. Is that inconsistent with schizophrenics in general?

A. Okay.

THE COURT: Now, you have your turn and she has her [41] turn, and the court reporter can't get both of you. All right.

A. He may or may not be schizophrenic.

Q. (BY MR. HAMPTON) You don't know?

A. I do not know.

Q. You've never made a conclusion about that?

A. I do not have a conclusion about that.

Q. Yet, you've made a conclusion that his responses to you during that interview were deliberate choices that a rational person could make, true?

A. I have concluded that his responses to me at the time that I saw him were deliberate, in my opinion, avoidances of the questions I was asking, and it was based on the way he responded, how he responded, his choices of almost – his responses were responsive; they were just indirect. When he said we were trying to trick him like they tried to trick Jesus, well, you know what, we were there to evaluate him for competency to be executed. I think he understood that. And he is absolutely right that if our conclusion is that he's competent, and if he gives us that information directly, then he will be executed. And that's what he said, that we are there as, in his perception, destroyers. He is projecting as if it's our fault if he gets executed as opposed to his. But he has a point, and there are people who have that viewpoint.

Q. So you were there to try to trick him?

[42] A. No.

Q. But yet, he accused you of that?

A. That's correct. That's his viewpoint.

Q. And your viewpoint really comes down to a subjective determination on your part, doesn't it?

A. It's both subjective and objective.

Q. The objective being what?

A. The mental status, his presentation, his capacity to have very complex abstract responses to questions, and the review of records, the interview of people who work with him, and the information available in his death packet, a lot of sources.

Q. Your basic conclusion, really, for the Court is the only one that you feel that you could give as a professional opinion is that he has a capacity to understand rationally?

A. In my opinion, he appears to have the capacity to understand. That's right.

Q. Okay. Did you know whether or not he was on medication that day?

A. He was not on psychiatric medications according to the records.

Q. Okay. When was the last time he was on that?

A. Long time.

Q. How many times has he been hospitalized?

A. He's been hospitalized a number of times. I don't know how many exactly.

[43] Q. All right.

A. Years ago.

Q. And what part of the report did you contribute to?

A. Dr. Parker and I worked on the report together. I don't have specific, I wrote this line, he wrote that line.

Q. Okay. Any disagreements?

A. What's in the report is agreed on by both of us.

Q. Is it ordinary to do joint reports?

A. For us, yes.

Q. You left after an hour?

A. Of interviewing Mr. Panetti –

Q. Uh-huh.

A. – we left that part of the evaluation after an hour.

Q. He seemed, I take it, throughout the interview pretty suspicious of you?

A. Well, he didn't appear fearful kind of suspicious. He seemed to know why we were there. And, yeah, he didn't want – I don't think the guy wants to die. And the evaluation was to determine whether or not he understands about being put to death. So I don't know if I'd call it suspicious, as opposed to he considered us there as folks who were going to contribute to his death.

Q. But you weren't?

A. I was not there for that purpose. I was there to give an opinion about his competency to be executed.

[44] Q. He mis-perceived that.

A. Well, he has his own perception and he has a point. He has a right to his viewpoint. It's not the way I go about it. I consider that I will give a straightforward viewpoint, and it is whatever it is. I don't – I don't have an agenda of what the answer is. I want to go and try and figure it out. So my viewpoint is very different. But his viewpoint, apparently, was that we were there in order to

assist in him dying. And, you know, I can understand where somebody might have that viewpoint. It's just not my viewpoint.

Q. Well, you know that he was diagnosed as a paranoid schizophrenic, right?

A. We got that one down, yes, sir.

Q. Okay. How many people have you evaluated for schizophrenia?

A. Very, very many.

Q. Okay. And they tend to be very suspicious people?

A. If they're not treated, they could be very suspicious. That's right.

Q. They have delusional systems?

A. They can.

Q. If his delusional system is what he represented to you and Dr. Parker, do you agree that he would be incompetent to be executed?

A. Not necessarily.

[45] Q. I'm specifically referring to he's being executed for preaching the word of God?

A. Well, again, I don't have a conclusion because he wouldn't tell me that he understands the facts of why the law says he's being executed.

Q. All right. You're not – then you're not saying – you're not telling the Court that he's competent to be executed or not competent to be executed based upon his understanding of why he is to be executed?

A. I am not giving a conclusion whether he's competent to be executed.

Q. All right. Pass the witness.

RE-DIRECT EXAMINATION

BY MS. DETTMER:

Q. Dr. Anderson, you're not giving a conclusion on whether he's competent to be executed because he wouldn't cooperate with this interview, right?

A. That's right.

Q. What are you giving a conclusion on?

A. That in my opinion, he appears able to understand the facts of why he is being executed. But since he would not say it to me, then I will not make that conclusion.

Q. So because he did not say the words to you, I know I am being executed because X, you're not willing to make that ultimate conclusion, correct?

[46] A. Because he did not say, I'm being executed for being convicted of capital murder, then that's right. I won't give a final conclusion because that's not up to me to determine.

Q. Okay. But based on everything else you reviewed, he has the ability to understand that, correct?

A. That's my opinion.

Q. Just one last question.

You testified earlier that when you asked him to take that test, he indicated he would have to check with his counsel before and get permission from counsel before he would agree; is that correct?

A. Yes.

Q. So he was aware of the fact that you were not there on behalf of counsel?

A. Sounds like it.

Q. I'll pass the witness, your Honor.

RE-CROSS EXAMINATION

BY MR. HAMPTON:

Q. You say you can't determine whether or not he knows why or – why he is to be executed because he didn't really cooperate with you, right?

A. That's right.

Q. All right. Yet, when asked that specific question, he answered your question. He said, for preaching the word of God, right?

[47] A. He did at some point say that, that's right.

Q. And that's an objective basis from which to conclude that he is incompetent, right?

A. I disagree.

Q. All right. Let me reverse it, then. What if you had asked him, why are you here on death row, and he said, for the murder of my parents-in-law, would you then have concluded that he was competent to be executed?

A. That and in combination with the other material, yes.

Q. And so, depending on what his response is, if he gives you the green light, the correct answer as to why he's on death row, and it's the correct one under the law that will put him to death, that one you will believe; but if he gives you the absolute opposite, which is the statement of his delusion that he is on death row for preaching the word of God, that one gets discounted and you won't agree with that, right?

A. Wrong.

Q. Well, that's what you just said.

A. No, it's not.

THE COURT: Well, we're being argumentative. I didn't hear her say that, so let's just relax just a little bit.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) When you give a report to a court, do you agree that it is important to give objective bases for your opinions?

[48] A. Yes.

Q. Do you think its important to demonstrate to a court the process by which you arrive at your conclusions?

A. Maybe.

Q. Well, do you think that it – your role is for a court to simply rely upon your own subjective determinations about somebody when you evaluate them?

A. Not generally.

Q. Okay. So they're looking for hard data?

A. I imagine in part, that's right. They're also looking for my expert opinion based on a lot of information that I've gained over the years.

Q. Okay. So experience and your expertise is what you're offering to the Court, right?

A. One of the things.

Q. Is that more important than detailing for the Court the objective bases for your conclusions?

A. I don't have an opinion on that.

Q. All right. Pass the witness.

MS. DETTMER: Nothing further, your Honor.

THE COURT: I want to know in your communication with others about Mr. Panetti who you talked to and how that played a part in the testimony you've given today.

THE WITNESS: I was reviewing records. And the woman who brought us the medical records said that the day before [49] she had gone to get a release signed by Mr. Panetti and for the review of the records, and he said, no, that he was not going to sign that, that his attorney had not told him to. And I'm paraphrasing here. That was one person. But we actually had a court order, so that was why we were able to review the records, anyway.

I talked with staff members, even as we were walking back to death row, who worked with Mr. Panetti and say, yeah, he can hold a conversation. The longest conversation was with Captain – I think it's Miller, if I remember

correctly. Major Miller, I'm sorry, who is apparently in charge of death row and has had conversations with Mr. Panetti, and was the one who filled out the – what they call the death packet with Mr. Panetti. And he said that Mr. Panetti filled it in. I have a copy of a handwritten death packet where he picks his –

THE COURT: I've heard Mr. Miller's testimony.

THE WITNESS: Okay.

THE COURT: But did you talk with people in addition to Mr. – Major Miller, I believe is his term – that had daily contact with Mr. Panetti?

THE WITNESS: Just with a couple of the guards and the folks that are already mentioned, and the sense was that he does preach a lot. Everybody knows – I mean, everybody who heard the name did know that he preaches a lot. But that, [50] also, he's able to hold a conversation.

THE COURT: And in your putting together this information and lack of information that you had, how much did you, if you can tell me, use the information you got from observers there in the unit?

THE WITNESS: It was used – I had an impression, but I wanted to make sure that the other information available was consistent. And so, it was used in that it was consistent with my impression based on what I had seen myself of Mr. Panetti. So if it had not fit – it's kind of like putting a puzzle together. If it had not fit, then I would have continued to gather more information and try and understand what was going on.

THE COURT: Did it have – did the information you had from the guards, and Major Miller, and those people who are in attendance on a regular basis, did that have any influence on you as to your belief that Mr. Panetti was deliberately avoiding your questions?

THE WITNESS: Yes.

THE COURT: All right. Mr. Hampton, any further question?

MR. HAMPTON: No, Judge.

THE COURT: Any further question, Ms. Dettmer?

MS. DETTMER: No, your Honor.

THE COURT: May this witness then be excused?

[51] MS. DETTMER: Yes.

THE COURT: You may be excused.

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[51] MARK D. CUNNINGHAM, called by the Petitioner, duly sworn.

[52] DIRECT EXAMINATION

BY MR. HAMPTON:

Q. Dr. Cunningham, are you a psychologist?

A. Yes, sir. I'm a clinical and forensic psychologist in private practice.

Q. All right. And are you board-certified?

A. Yes, I am.

Q. Who certified you?

A. I'm board-certified in forensic psychology by the American Board of Professional Psychology.

* * *

[59] Q. (BY MR. HAMPTON) You've heard the testimony of Drs. Parker and Anderson?

A. Yes, I have.

Q. And they have used phrases – Dr. Anderson just said that he was able to, he had the capacity to respond. Dr. Parker says that he's controlling, deliberately not responding. Do you think these are fair characterizations of – and you've interviewed Mr. Panetti?

A. Yes, I have.

Q. Along with these records. Do you think this is a fair characterization, and if not, why not?

A. No, sir, I don't think it's a fair characterization.

Q. All right. Tell the Judge, in short order, what's wrong with this report.

A. There are a number of reasons why I think that Mr. Panetti cannot be regarded as simply uncooperative. Very importantly, the behavior pattern that he displayed in his interview with the state experts of speaking around the issue, not coming to [60] the point, responding with religiosity, instead of with a concrete answer, is entirely consistent with what was described by people who have

interacted with him historically who would, otherwise, be regarded as on his side.

So, for example – and I could turn to places in the affidavits and the records, if it's helpful to illustrate it – but Scott Monroe, his stand-by counsel, described in his interactions with Mr. Panetti that he did a similar sort of thing with him.

Q. And for the record, that is his own attorney?

A. That's correct.

Q. He was trying to save his life?

A. Yes, sir.

Q. And he's not cooperated with him?

A. He's describing –

THE COURT: It's the attorney he rejected. He was a stand-by counsel at the end, and I have no doubt that he was trying to do his best in between taking all of the Aspirin that he probably needed.

MR. HAMPTON: I'm just drawing the contrast.

THE COURT: I understand.

MS. DETTMER: I just want to make sure that I'm objecting to the form of the question and would ask that he would not lead this witness. It's his witness.

THE COURT: Okay. Make it timely if you're going to [61] object.

A. Not only with his stand-by counsel but, also, with Richard Mosty, who testified at the competency hearing and described, for example, Mr. Panetti had a list, that I

would estimate of handwritten stuff, of 15 to 20 pages of things that he was not going to talk to us until he had – for lack of a better word, until he had interviewed us. Question: And did you find those questions related in any rational way to the crime, or to his attorneys, or to anyone anything? They did. They had absolutely no relation to the case. They were – there were personal questions. There were questions like whether or not the lawyers had ever used hallucinogenic drugs, whether or not we had had sex with a man, you know, a whole list of questions like that that he was going to ask us before he would talk to us.

Q. And that is the – you're reading from the record from one of –

THE COURT: Competency hearing.

MR. HAMPTON: Yes.

A. The competency hearing September 9th, 1994, Volume 13 of 43 volumes.

This same sort of interaction pattern is displayed as Mr. Panetti interacts with his family members. And so, for example, when you review the affidavit of Jessica McBride and Victoria Panetti, they described that he was doing the same [62] thing with them; that they would go with an agenda of things they needed to try to talk to him about, and instead, he would take over the conversation and dominate it and not let them get a word in edgewise, and be off on all kinds of tangents that were irrational, and delusional, and over-religious, and that sort of thing.

Now, as an expert, as I encounter the way that somebody is reacting to me, one possibility is that it's situation-specific. He's reacting this way to me because of what I'm here to evaluate, and it's a deliberate thing. To the extent

that this same sort of interaction pattern, though, is demonstrated multiple times in the past with many different individuals, including individuals that would otherwise be seen as in his corner, then it's much more difficult for me to support a hypothesis that this is because of my role, or what I'm doing, or that somehow he's behaving in a fundamentally different way with me than he has with other individuals.

Now, one of the things that Mr. Mosty observed is a differential is that when Scott is interacting in a place that he is very comfortable and familiar with, that if he stays in the same place, in the same jail, interacting with the same people, then in those conversations, particularly about more mundane matters, he tends to be more lucid. As you confront him with a new situation, it's as if it overwhelms his RAM, his capacity, and then, he doesn't – then, he goes off on [63] these tangents and is much less – is much less relevant.

Q. All right. And a person in that situation that's coming on to him under the latter scenario that you just said, he's going to appear, I guess, uncooperative with someone?

A. Yes, sir. He is more likely to be overtly psychotic in his interactions as you increase the stress that he's under.

Q. Okay.

A. So as he's interacting with somebody who is unfamiliar to him, as you're talking about case-specific information that is anxiety-provoking, or disturbing in some way, then he exhibits this more disorganized thought pattern and takes over the conversation. And this isn't just

with Drs. Anderson and Parker. This is with his family and with his attorneys, and is entirely consistent with somebody who's schizophrenic.

Q. Okay. Then, what's wrong with Dr. Anderson's testimony that, in her opinion, he has the ability to answer the questions but was deliberately choosing not to?

A. Well, first, you have to understand that when somebody is schizophrenic, it doesn't diminish their cognitive ability. It doesn't make them retarded where they don't know where the door is, don't know that you're a doctor, don't understand that these are corrections officers. It doesn't render them stupid.

Instead, you have a situation where – and why we call schizophrenia thought disorder is the logical integration and [64] reality connection of their thoughts are disrupted, so the stimulus comes in, and instead of being analyzed and processed in a rational, logical, linear sort of way, it gets scrambled up and it comes out in a tangential, circumstantial, symbolic sort of relevant, not really relevant kind of way. That's the essence of somebody being schizophrenic.

And so, when I encounter someone like that and they respond in that way, they're behaving like somebody who is unmedicated, untreated schizophrenic, and that's what they can do under these demand characteristics. Now, it may be that if they're dealing with someone who's more familiar, if they're inside their own cell, where they spend 23 hours a day and have for years, and what may feel like a safer, more enclosed environment for them – and we're talking through this little screen in the door about their commissary, or about whether they're going to come out for a visit, that those sorts of interactions may be reasonably

lucid whereas a more extended conversation about more loaded material would reflect the severity of his mental illness.

Q. Well, did you hear the testimony of the correctional personnel?

A. Yes, sir, I did.

Q. Would you – is there other personnel at the prison that you would have preferred to have heard from?

A. Oh, yes, sir.

[65] Q. Okay. Who would that be?

A. I would prefer to have heard from the rank-and-file officers who are passing his tray through the door to him every day, who are cuffing him up to bring him out to exercise, who are watching him circle the exercise area, you know, shouting and preaching and singing, and those kinds of things, the folks that had day-to-day, practical, repeated, extensive interactions with him.

Q. All right. Now, Drs. Parker and Anderson spent an hour with him and left. Others have had much better luck with him.

How do you explain that Dr. Conroy and Dr. Rosin and Dr. Silverman were able to gather a lot more information than Parker or Anderson?

A. Well –

MS. DETTMER: Your Honor, I'm sorry, before he answers the question, I'm going to object. I'm pretty sure that's speculation on his part as to – I mean, he wasn't

there for those interviews. I don't think that he – without speculating, he can't explain that.

MR. HAMPTON: Well, I think he can – he's heard all the testimony here today.

THE COURT: So have I.

MR. HAMPTON: And he can point out, at least, one of the reasons of the apparent issue of cooperation versus non-cooperation.

[66] THE COURT: Well, he wasn't there. I sustain the objection.

MR. HAMPTON: All right.

Q. (BY MR. HAMPTON) A person who suffers from schizophrenia – well, is it wrong to assume that a person who's suffering from schizophrenia is either completely a raving lunatic all the time or is completely faking it and is rational? I mean, is it a "neither or" situation?

MS. DETTMER: I'm not sure how this is in rebuttal to either Dr. Anderson or Dr. –

THE COURT: It is not. I sustain the objection.

Q. (BY MR. HAMPTON) Well, you heard Dr. Anderson's testimony?

A. Yes, sir.

Q. Did she make certain assumptions when she made – that you could perceive as an expert when she arrived at her conclusions?

A. Yes, sir.

Q. What are those?

A. One of those was the interpretation that she gave to very, very symbolic material about Jesus, and what Jesus said, or a parable about Jesus, and those kinds of things, and then, inferring that, therefore, that means Scott understands this. Now, what Scott is putting out is this very religious symbolic sort of information. I take that – or Dr. Anderson's in a rational mind and I say, okay, rationally, what sense does [67] that make? But I really don't know whether that's the connection that this person is saying or not. That's the imposition of my rationality on what they're putting out in a pretty symbolic sort of way.

Now, Dr. Anderson asserts that Mr. Panetti is uncooperative, and I don't agree with that characterization. Mr. Panetti is in the room and he is verbalizing and responding. As a mental health professional, my role is to try to understand the mental processes of this individual. If they're talking, I ask a question. What I get back informs my perceptions of them.

Now, I don't need for them to respond in a highly rational, linear, logical sort of way in order to gain information about their thought processes, otherwise, I could never really get a notion of the thought processes if somebody was floridly schizophrenic, because when you talk to them, that's not how they respond. And so, if he's talking, I'm gathering information. And the longer that I sit there, the more information I'm going to get.

Now, with Dr. Conroy, he got up and left the room after an hour and a half. Much less cooperative than this where he's still present when the interview is concluded. And so, as he continues to talk, there's an opportunity to get information about just how long can he keep it up, if there were questions about whether he's manufacturing

this. There's [68] also the possibility that as I wait him out and he becomes more familiar with me, that his anxiety level decreases, and the capacity to be more relevant may emerge; or that I may get some tidbits here and there while I wait through the other things that he has to say.

Q. Okay.

A. And so, he's giving information and –

MS. DETTMER: Your Honor, I know I should have objected to this more timely, but I would ask for a question and he be responsive.

THE COURT: Well, I haven't seen in Petitioner's 8 that you didn't object to his report once, I'm sure covering a lot of this stuff. His evidence in the report, I'm sure is more than rebuttal. But this, at least, is in the nature of rebutting the testimony of others, so I will hear it.

MS. DETTMER: Okay.

Q. (BY MR. HAMPTON) Do you think as an expert who's evaluated people with schizophrenia, do you think it is fair to conclude that his behavior with Parker and Anderson was the result of a conscious choice on his part to not cooperate?

THE COURT: Well –

MR. HAMPTON: All right. Let me ask this, then.

Q. (BY MR. HAMPTON) There is one thing that Dr. Parker, whose testimony you heard, did conclude and that is – and we've heard it throughout that they intend to kill him and that he [69] understands that. That you heard that testimony?

A. Yes, sir.

Q. Okay. Is it clear to you, having read the records and interviewed him yourself, of what his understanding who "they" is? Does he understand – essentially this: Does he understand that it is the state of Texas that intends to take his life?

A. Not as a lawfully constituted authority.

Q. What's your basis for that opinion?

A. He described in my own interview of him that he was going to be executed – and I'll turn to that so I can quote it, specifically. I asked him why he is on death row, why is he going to be executed. He said, for preaching the gospel of Jesus Christ. And he went on to say that they didn't want him to go back to Wisconsin preaching the gospel, and that the anti-Christians were there. And I said, who were they? And he said, well, it's the national headquarters for the Wickens. And then, he went on to describe that this conspiracy goes up into the highest levels of the administration.

He also talked about regarding the date of his execution that they might try to sneak him in, that they might try to execute him early, even in advance they, the state. So as he's describing the state of Texas, he's not characterizing – doesn't reflect a perception of the state of Texas being lawfully constituted authority, working under the constraints [70] of the law.

Q. Okay.

A. Rather, he's describing this as being in league with the forces of evil to prevent him from preaching the gospel as a specific delusional belief.

Q. All right. Which is consistent with the rest of his delusional belief?

A. Which is consistent with his long-standing delusions of religiosity, as reflected in his psychiatric hospitalizations and schizophrenia diagnoses and schizo-affective diagnoses through multiple psychiatric hospitalizations during the 1980s.

Q. Would you agree that expert opinion per court-of-law that the highest value for expert opinion in a court-of-law is reliability?

A. Yes, sir. The greatest benefit is of highly illuminative and descriptive information so that the Court or the jury is able to come to their own well-illuminated conclusions. It's not the reliability of my ultimate determination, it's the data that I gather and the detail of that data, and the logic of how I integrate that data.

Q. The process?

A. The process. The details, the data, and the process, not the ultimate conclusion.

Q. All right. Last question I want to ask you about is [71] you've reviewed the psychiatric records from the prison, right?

A. Yes, I have.

Q. There is a Dr. Gilhousen, I think is the one that's mentioned there?

A. Yes, sir.

Q. Are you familiar with him?

A. I have encountered his name in prison records before, yes, sir.

MS. DETTMER: Your Honor, I'm not sure how this is in rebuttal of Dr. Anderson or Dr. Parker's testimony.

MR. HAMPTON: Well, it was brought out that these records got introduced into evidence, and there's some indication from these doctors that they've – that he's malingered. There's no basis for it, of course.

THE COURT: Now, let's – you know, I'm trying to be as patient as I can. If you want to testify, you take the oath and you get up here. I've been patiently listening, and I don't disagree with a lot of things that Dr. Cunningham is saying, but it was all existing before a jury found this man competent, and another jury found him sufficiently competent to convict him and give him the death penalty. And a judge found him competent to represent himself, which was not reversed on appeal.

So let's finish it up. If you're going to throw muddy [72] water on this doctor who didn't testify, let's throw the muddy water and get it on.

Q. (BY MR. HAMPTON) Okay. Do you know anything about him?

A. I have encountered his name in other medical records of individuals on death row.

Q. Have you detected any sort of a bias on his part?

MS. DETTMER: Your Honor, that is speculation.

THE COURT: Do you know him?

THE WITNESS: I don't know him apart from his records.

THE COURT: Yeah. I sustain the objection.

MR. HAMPTON: That's all I have.

THE COURT: All right. Counsel, we'll reconvene. I've got some matters at 1:30. We'll reconvene, I hope, by a quarter of 2:00. If not, be a little patient. We'll be through as soon as I can with the 1:30 hearings.

(Lunch recess.)

THE COURT: All right. The Court recalls 04-CA-42, *Scott Louis Panetti vs. Dretke*.

Dr. Cunningham's still on the stand. You understand you're still under oath?

THE WITNESS: Yes, sir.

THE COURT: Ms. Dettmer, the witness is yours.

MS. DETTMER: Your Honor, we have no questions for this witness.

THE COURT: Okay. All right, sir. You may step down.

* * *

PETITIONER'S EXHIBIT 2

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June 11, 1997

John Rowland, Esq.
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In re: Scott L. Panetti (999164)

Dear Mr. Rowland:

Pursuant to your request, I evaluated your client, Scott Lewis Panetti, with regards to his Writ of Habeas Corpus before the Court of Criminal Appeals. Mr. Panetti represented himself before the jury in his capital murder trial in 1995, and received the death penalty. I interviewed Mr. Panetti on February 6, 1997 for two and a half hours. Prior to his interview, I informed him of the purpose and non-confidential nature of the evaluation; he said he understood and gave his consent. In addition to his clinical interview, I also relied upon the following records in reaching my opinions:

1. Medical Records, Kerrville State Hospital.
2. Medical Records, Starlite Village.
3. Medical Records, Waco Veterans Administration Hospital.
4. Medical Records, Tomah Veterans Administration Hospital.
5. Medical Records, Northern Pines Unified Services.

6. Medical Records, Cumberland Memorial Hospital.

7. Medical Records, Kerrville Outpatient Clinic.

8. Medical Records, Texas Department of Corrections.

9. Medical Records, Bell County Jail.

10. Records, Fredericksburg Police Department.

11. Statement, Sonja Panetti.

12. Trial Record, State v. Scott Lewis Panetti.

Based upon the foregoing information to date, I have the following opinions, all to a reasonable degree of medical certainty.

1. Scott Lewis Panetti suffers from Schizoaffective Disorder (a combination of Schizophrenia and Manic Depression).

2. Scott Lewis Panetti suffered from Alcohol Abuse which exacerbated his above condition.

3. Scott Lewis Panetti suffered from Cannabis Abuse which exacerbated his above condition.

4. Scott Lewis Panetti's psychiatric illness contributed to his mental state at the time of this offense.

5. Scott Lewis Panetti's psychiatric illness, particularly the Schizophrenic component, gave rise to his waiver of counsel and choice to represent himself.

6. Scott Lewis Panetti's psychiatric illness rendered him incompetent to undergo his capital murder trial (guilt/innocence and sentencing components).

RELEVANT HISTORY

Incident: Mr. Panetti was under an order of protective custody having threatened to kill the parents of his wife. On September 8, 1992, Mr. Panetti drank alcohol, sawed off the barrel of his shotgun, and shaved his head before dressing in Army fatigues and taking a shotgun, rifle, and several knives with him to the residence of his parents-in-law where his wife and daughter was staying. Mr. Panetti entered their home and shot both of his wife's parents before taking his wife and daughter to his bunkhouse. Mr. Panetti changed into a suit prior to turning himself in when the police surrounded his bunkhouse.

Mr. Panetti underwent a first competency hearing in Boerne, where the jury could not decide his status to stand trial. He underwent a second competency hearing in Georgetown where the jury found him competent to stand trial. Mr. Panetti allegedly had an April Fool's religious experience on April 1, 1995, discontinued his medication, and subsequently requested that he represent himself in his capital murder trial. The jury convicted him of capital murder and sentenced him to death in September, 1995.

Psychiatric: Mr. Panetti was first hospitalized in 1981 at the Kerrville State Hospital. Records revealed he was hostile, defensive, suspicious, grandiose, and claimed that he was mistreated by others. His diagnosis was Alcohol Dependence. Mr. Panetti was admitted to Starlite Village (for alcohol) in April, 1986. However, records indicated he

was hyperactive, distractible, hostile, grandiose, paranoid, and had impaired attention and incoordination; he was also psychotic, delusional, and actively hallucinating. His diagnosis was Chronic Undifferentiated Schizophrenia, Alcohol Intoxication Abuse, Alcohol Abuse and Dependence, and Marijuana Abuse. He was transferred to Kerrville State Hospital for further evaluation. Hospital records there indicated that Mr. Panetti had a history of periodically speaking incoherently and was paranoid and grandiose. He was diagnosed with Alcohol and Cannabis Abuse and Dependent Personality Disorder prior to his transfer to the Waco Veterans Administration Hospital for further evaluation. Waco Hospital records indicated that Mr. Panetti was paranoid and buried some of their (his family) furniture because of his belief that the devil was in the furniture. Mr. Panetti had nailed their curtains shut so neighbors wouldn't film them. His doctors gave him a diagnosis of Chronic Undifferentiated Schizophrenia, Alcohol Dependence, and Marijuana Abuse; and treated him with anti-psychotic medications. After his discharge from the Waco VA Hospital, Mr. Panetti moved to Wisconsin and was noncompliant with his medications and follow-up. He was subsequently hospitalized at Northern Pines Unified Service because of his depression and suicidal ideation. Subsequent records indicated that he was grandiose and believe the Feds watched him; he was admitted to Cumberland Memorial Hospital with a diagnostic impression of Major Depression, Chronic Alcohol Dependence, Polysubstance Abuse, Minimal Brain Dysfunction, and Antisocial Personality Disorder. Hospital records indicated there were also delusions of reference, auditory hallucinations, and homicidal ideation (hurting his family). Mr. Panetti later returned to Texas and was subsequently hospitalized at Starlite Village for a second

time. Because Mr. Panetti was psychotic, he was transferred once again to the Kerrville VA Hospital. There, his psychiatrist diagnosed him with Schizoaffective Disorder and treated him with a combination of Trilafon (anti-psychotic), Elavil (antidepressant), and Lithium (mood stabilizer). He was followed in the outpatient clinic, and his condition was relatively controlled on this medication regimen. In August, 1990, Mr. Panetti was involuntarily committed to the hospital because of homicidal behavior; threatening to kill his wife, baby, father-in-law, and himself, breaking their door window twice, and swinging his sword around the house. Records further revealed that Mr. Panetti believed there was a plot against him by the citizens of Fredericksburg. In July, 1992, Mr. Panetti was once again admitted to the Kerrville VA Hospital showing evidence of manic symptoms. Records indicated diagnoses of Schizoaffective Disorder and Alcohol Dependence. During this hospitalization, records first revealed the possible presence of three personalities or aspects of himself that he gave names to. Records also indicated that Mr. Panetti had once again threatened his family with a sword and that delusions, grandiosity, and psychotic religiosity, i.e., that Mr. Panetti was Nazarite were present. Subsequent Bell County Jail records showed that Mr. Panetti was evaluated in late September, 1992, and prescribed Trilafon (anti-psychotic) for his symptoms. Medical records later revealed that Mr. Panetti was on a regimen of Elavil, Haldol (anti-psychotic), and Prozac as late as March, 1995. Subsequent records however, indicated that Mr. Panetti was showing evidence of looseness of associations (thought disorder), clang speech (manic symptom), and disorganization of his thought processes. Further, records indicated Mr. Panetti was hallucinating and becoming more delusional.

Pre-Trial: Mr. Panetti made several pre-trial motions including motions to disqualify Judge Abels, for a continuance, to suppress evidence, to dismiss assistant counsel, and for a change of venue. In his writings, Mr. Panetti's central idea was that he would not get a fair trial in Fredericksburg or Gilespie County or Kerr County. He believed that people in Fredericksburg were plotting against him. Mr. Panetti also subpoenaed people that he was in the Navy with, jailers, first wife's family members, other inmates, and many people from Wisconsin who worked with him before; he also subpoenaed Anne Bancroft. The district attorney (Mr. Curry) even filed a motion to quash defense subpoenas (over two hundred witnesses) because they were vague, broad, and often illegible. Mr. Panetti continued filing motions for a new cell, for treatment of his mental illness, and for taking breaks outside due to cabin fever. One ten-page letter to Judge Abels just prior to the trial contained numerous Biblical passages, idiosyncratic expressions, flight of ideas (sudden changes in his though processes), loose associations (communication that was not coherently connected together), and incoherent, illogical thought processes (373-384).

In general voir dire, court records indicated Mr. Panetti was circumstantial (extraneous detail to the point of losing the main theme), tangential (not related to the central theme or task at hand), and with very loose associations at times. Records also cite numerous Biblical passages that Mr. Panetti used as a reference. He additionally indicated that he didn't need a lawyer because of his mental illness and paranoia and that lawyers were in cahoots (with one another).

Trial: Mr. Panetti's opening statement showed looseness of associations (32) and flight of ideas (32) that often made

his communication to the jury incoherent. For example, Mr. Panetti discussed having an appointment with an expert in Bell County before suddenly transitioning to the subject of being able to pay, and then on to the subject of Medicaid, and then on to the subject of some jurors that were not chosen, and later concluding that one of the jurors called him a liar. He often spoke of religiosity and even stated that he had confused thoughts. Although the court warned him that he had only two minutes left in his opening statement, Mr. Panetti could not proceed further in an organized and coherent manner.

Mr. Panetti's direct examination testimony essentially began with his birth. He discussed a near drowning episode, falling off a horse, and messing in his pants when he was a child. He later described his school in Wisconsin, the carpeting there, and how he wanted to look up his teacher's skirt. At one point, he showed the jury a tattoo on his arm (wounded sunbird) and went into excessive detail about it. After the court redirected him, Mr. Panetti talked at length about his high school sweetheart in a loosely connected manner. The judge redirected him for a second time to relevant evidence. After Mr. Panetti discussed bull riding, all conference high school interactions, and that his father looked like Colonel Sanders (they got a big food deal), the court redirected him time and again to the relevance of the guilt/innocence phase of his trial. After a lengthy discussion of the Naval Intelligence School and further repeated an unsuccessful redirects from the bench, the court eventually recessed for lunch. Following the break, Mr. Panetti's dialogue was circumstantial, tangential, and full of looseness of associations (1483). Despite continued redirection, Mr. Panetti described working with his father on a Texas ranch. At times, Mr.

Panetti in the middle of his testimony said – relevance – as if he and the judge had made eye contact. Mr. Panetti nevertheless continued going into excruciating detail about his first wife, their wedding, his previous job as a telephone and electrical line repairman, and his work on various ranches. The district attorney even asked the court to instruct Mr. Panetti to talk about his guilt or innocence and not about his life story. After taking off his ring and looking at it a couple of times, Mr. Panetti perseverated about his objection (repeatedly went over it again and again). Later in his direct testimony, Mr. Panetti discussed his alcohol problems, hospitalization at Starlite Village, having conversations with animals, seeing the devil, and performing an exorcism of his house – sticking knives in the ground to get the devil out. Despite numerous court redirects, Mr. Panetti continued discussing his medical history at length. Mr. Panetti eventually testified about Sarge (a separate part of himself that was later identified as an auditory hallucination) and stated that demons were cackling at him (at the time of his offense). He finally ended his testimony with the statement "just thy will be done."

During his closing statement in the guilt/innocence phase of his trial, Mr. Panetti exhibited looseness of associations and flight of ideas. The transcript revealed at one time that he seemed to play on the word *will* in his testimony (clang speech). Mr. Panetti then discussed his confessions, voluntary intoxication, and made an attempt at describing how he was mentally ill. He was, however, circumstantial and with little direction and coherence. In the punishment phase of his trial, Mr. Panetti once again exhibited looseness of associations, tangentiality, and flight of ideas in his thinking and communication. He was once again

religiously preoccupied, but discussed his mental illness and different personalities, and that he was responsible for the deaths of his in-laws.

Interview: Mr. Panetti began the interview by warning me that everything we said would be monitored because he was being punished for being a Nazarite. Mr. Panetti then rambled from one subject to the next without any ties or cohesion between his subjects. He talked of demons, Bible passages, alcohol abuse, being abused by the baby-sitter, homosexuality, various ranch jobs, and that he was a special messenger or prophet. Mr. Panetti described how he had a religious experience on April 1, 1995, and as a result gave up taking his medications. He said the spirits kept him strong because he had stayed with the Almighty before.

Mr. Panetti said his first lawyer didn't show up for a long time and that they had very little communication. Mr. Panetti said his lawyer wanted to save his life, but Mr. Panetti only wanted treatment for his insanity. Mr. Panetti said his female attorney did not want to present anything about his past psychiatric history, and that they were trying to sweep him away to a life sentence. Mr. Panetti said that he relied on is spirituality during his trial, and said the voices he heard were his allies, keeping him in check. Although the judge apparently wanted Mr. Panetti to quickly pick a jury, Mr. Panetti prided himself in being even with the DA on preemptory strikes of potential jurors.

Mr. Panetti said that his parents-in-law made Sarge come out. Although Sarge wanted to kill Scott, he reportedly could not. When Mr. Panetti went to his in-laws home, he said he shot them in the heart, and because of divine

intervention, they didn't suffer. As he left their house, he said demons were laughing at him, and he reportedly went to the bunkhouse because his saddle was there. Mr. Panetti said that his wife paid the Texas Rangers to apprehend him, and that the jury hated him. He waived his appeals (after his trial) to keep his dignity (because so many people were against him). Mr. Panetti further revealed his mission here was to withstand persecution because man could not execute a sacred Nazareth.

Mental Status Examination: Mr. Panetti was dressed in TDC attire. He had a long straggly beard and was disheveled. He had some eye contact with this examiner, and when present, was quite an intense stare. He was very suspicious and guarded. He was irritable and extremely religious, to the point it was difficult to understand his thought content. At times, when it was only he and I that were in the room, he stopped speaking as if he heard someone else talk to him. He spoke rapidly and with pressured speech, such that I had to interrupt him several times in order to carry on a conversation with him or keep him on track. Otherwise, he verbalized at length about nothing. He exhibited severe flight of ideas, jumping from subject to subject to subject with little cohesion. He showed tangentiality to my questions, giving a statement (answering) to my question that was totally irrelevant. At times when he began a statement (answer) that was appropriate) to my question, he went off onto a tangent that was similarly unrelated. Mr. Panetti was extremely circumstantial, giving so many extraneous details that it was difficult to assess the core theme or content of his statements. He was restless and hyperactive. He was very egocentric, to the point that he was delusional in a grandiose way (believing he was a messiah of some sort). He had

very little expression on his face except for an occasional smile that was inappropriately related to what he was speaking about. He often spoke with clang speech, rhyming his responses to whatever words I had used or to the last word he had used. He was also perseverative, in the sense that he would repeat a word or phrase or my own several times without reason. He had no insight into his condition. His mood was manic. His intellectual functioning was very difficult to assess, based upon his degree of incoherence and lack of logic. He was not suicidal or homicidal. He was oriented.

SUMMARY AND CONCLUSIONS

Medical records indicate that Scott Panetti suffers from psychiatric illness throughout most of his adult life. Although records show varying diagnoses over the years, it is obvious that Mr. Panetti's mental state reaches psychotic proportions at times. Mr. Panetti's medical records also identify problems he had with alcohol and marijuana abuse, but these two substances cannot produce the chronic effects of a psychotic disorder. Any inference that Mr. Panetti's psychosis is as a result of abusing alcohol or marijuana is simply wrong, given the well known pharmacological profiles of these two substances. As a result, his abuse of these substances exist as a separate but parallel condition. The psychiatric literature is replete with studies showing the high incidence of alcohol and substance abuse in our nation's seriously mentally ill patients.

Records indicate that Mr. Panetti exhibits manic symptoms (grandiose thinking, rapid speech, flight of ideas, irritability). While alcohol intoxication can sometimes cause hypomanic-like symptomatolgy, Mr. Panetti's symptoms are active

despite not being intoxicated. It is therefore evident that whenever manic symptoms appear in his records, Mr. Panetti is indeed cycling through the manic component of his manic depression (bipolar Disorder). In my own interview of Mr. Panetti earlier this year, Mr. Panetti's mania is remarkable. He speaks rapidly. He has an intense interpersonal demeanor. He jumps from topic to topic. It is difficult to intervene/interrupt him while he's talking (pressured speech). He has grandiose delusions (believing he is a messiah of some sort). The intensity and severity of his symptoms during my interview of him (also corroborated in medical records by other clinicians) is too difficult to feign, as some clinicians have inferred previously. It is obvious that Mr. Panetti does indeed suffer from a manic depressive condition intermixed with a though or psychotic disorder (below).

As I state earlier, Mr. Panetti's records reveal the presence of a thought disturbance, both in perceptions (auditory hallucinations), content (delusions that his home is possessed by demons, that the Feds followed him, that people in Fredericksburg were plotting against him – including his attorney, that our own conversation during his interview was being monitored) and processes (loose associations, tangentiality, clang speech, perseveration – repeating the same topic over and over). Although Mr. Panetti is at times manic (his past medical records and during my interview of him), it is more evident that he has a thought disorder consistent with Schizophrenia. During my evaluation of him earlier this year, he continues to exhibit loose associations, tangentiality in his thinking, delusions of persecution, and bizarre and idiosyncratic thinking. These symptoms corroborate what others observed in him in the past. As a result, Mr. Panetti's psychiatric

condition is a combination of Schizophrenia and Manic Depression (Bipolar Disorder), and commonly identified as a separate entity called Schizoaffective Disorder.

Medical records indicate that Mr. Panetti receives varying medications for his complex psychiatric disorder. In most cases, Mr. Panetti is treated with powerful anti-psychotic drugs, to decrease the symptoms of his schizophrenic though disorder. At other times. Mr. Panetti is treated with antidepressant medications for the depressive component of his Bipolar condition. At yet other times, Mr. Panetti is treated with Lithium to decrease the severe manic symptoms of his bipolar condition. It is noteworthy to this examiner, that Mr. Panetti's clinical course is most effectively treated when he is on a combination of a mood stabilizing drug (Lithium) and an anti-psychotic medication. This combined modality of psychopharmacologic agents makes sense, given the presence of his Schizoaffective Disorder.

The course of Schizoaffective Disorder is similar to both Schizophrenia and Bipolar illness. In short summary, schizophrenia is a chronic disease which almost always has some degree of activity throughout a person's life, and the varying symptom severity determines the degree of impairment. For example, individuals who suffer from a disturbed thought process (loose associations, for example) would have rather severe difficulties in communicating with others. On the other hand, suspiciousness of others might not substantially impair an individual's behavior or decision making as it would if the suspicions became very intense and reached delusional proportions. In a similar vein, varying symptom severity, whether it be mania or depression, determines the degree of impairment.

The chronicity and waxing and waning course (above) is most evidence in Mr. Panetti's medical records; it is also observable during Mr. Panetti's entire trial. Medical records reveal that Mr. Panetti stops taking his own medication in the months preceding his trial. As a result, and factoring in the stress of a trial upon any defendant much less one representing himself, any clinician can reasonably foresee that Mr. Panetti's symptoms would worsen, i.e., that Mr. Panetti would become more ill. The trial record corroborates my clinical acumen. Having the opportunity to review Mr. Panetti's testimony during his trial, I can observe his underlying psychiatric disturbance –word for word. Additionally, observing his communication in court reflects upon his overall though processes and how it has been impacted by psychiatric disease. There are numerous incidents in Mr. Panetti's trial when he exhibits flight of ideas and grandiosity (symptoms of mania), but there are even more examples of looseness of associations and tangentiality in his thought processes (symptoms of Schizophrenia). Example after example of the court repeatedly redirecting Mr. Panetti to stay on line with relevant evidence is a stark example of how he cannot think and communicate rationally because of his underlying disease. It is certainly understandable from a lay point of view how frustrating it was for the court, particularly not appreciating that Mr. Panetti's disease was the reason for his inability to comply with the judge's requests.

It is evident to this examiner that both the manic and schizophrenic components of Mr. Panetti's Schizoaffective Disorder are alive and well during his entire litigation. Prior to his actual trial, and keeping in mind that Mr. Panetti discontinues his psychiatric medication, I am not surprised to find that Mr. Panetti's symptoms return

(as I state earlier). Looking at past medical records when Mr. Panetti is previously ill, records show symptoms of persecutory delusions, auditory hallucinations, looseness of associations, thought tangentiality, and idiosyncratic and sometimes bizarre thinking. As a result, I would expect that some, if not all, of these symptoms would similarly return to a more active form when Mr. Panetti was no longer on medication. His trial testimony – word for word – shows remarkable looseness of associations and tangentiality throughout his trial. These are symptoms of his disease and he cannot reasonably control them without the aid of medications. Without medications treating these symptoms, it is understandable how Mr. Panetti would lose his ability to communicate accurately and rationally with others. This is obviously the case reviewing his testimony. In Mr. Panetti's pretrial motion to represent himself, he gives no reason *why* in the actual court document. However, without medication and in the midst of active schizophrenic disease, Mr. Panetti perceives that others are against him just like previous records indicated earlier. Records reflect that Mr. Panetti's wife, the Texas Rangers, the community of Fredericksburg, the judge, and Mr. Panetti's attorneys are all against him. Under the influence of persecutory delusions, I cannot reasonably appreciate how Mr. Panetti's waiver of his own attorney could be a reasoned and rational choice.

It is clear to the examiner that Mr. Panetti retains *personal choice* throughout his trial proceedings. This is not unexpected, since even the most psychotic individuals I have seen in my career still have personal preferences and choices. However, the clinical crux of a reasoned choice is determined by whether a person's psychotic thought process is involved in that decision making process.

Hypothetically speaking, an individual like Mr. Panetti could have a delusion that only law enforcement officers wearing sunglasses were trying to harm him. In this scenario, being in a court room would be less threatening to him. In Mr. Panetti's actual scenario, he believes (delusionally) that everyone that he encounters in Fredericksburg is intent on giving him an unfair trial, and it is this reasoning that underlies his choice in filing a motion to waive his counsel. As a result, Mr. Panetti's choice is affected by his psychiatric disease (in this case, a psychotic condition) and cannot represent a truly reasoned choice.

Although the trail [sic] court accepts Mr. Panetti's waiver of counsel and allows him to represent himself, Mr. Panetti's testimony indicates that he is cognitively impaired by his own thought disorder. Even though Mr. Panetti's choice to represent himself is a personal decision, his ability to carry out this personal decision is still limited by his psychotic disease. Mr. Panetti's thought disorder renders his thinking incoherent, illogical, and goal nondirected. These three elements in thinking are elements every psychiatrist evaluates in a mental status examination. These three elements are disturbed during Mr. Pantelli's trial. As a result of his thinking disturbance, and whether or not Mr. Panetti expresses a personal choice to defend himself, his ability to comprehend, understand, assimilate, and finally communicate his ideas and perceptions and thoughts to others will all be limited by his psychosis. Under the constraint of such a severe thought disturbance, Mr. Panetti, or any other individual with these same symptoms, would not retain the ability to rationally understand and communicate with his counsel, much less participate in his own self defense. As a result, I

cannot appreciate that Mr. Panetti has a rational understanding of the litigation against him.

In very short summary, Scott Panetti suffers from Schizoaffective Disease, a chronic psychiatric disturbance that requires ongoing mediation management with varying medications of which Mr. Panetti suddenly discontinues several months prior to his trial. As a result of his unmedicated state, Mr. Panetti's disease process deteriorates to such a level that he was subject to persecutory delusions, and severe disturbances in his thinking (and ability to communicate with others). His decision to waive his own counsel was under the influence of persecutory delusions, and his ability to represent himself in court was substantially impaired by disturbances in his thought processes (looseness of associations, et cetera). As a result, Mr. Panetti could not have met the Dusky standard for competency to stand trial.

If I can assist you further, please contact me.

Sincerely,

/s/ Michael R. Arambula
Michael R. Arambula, M.D., R.Ph.

MRA/kb

401 F.Supp.2d 702

United States District Court, W.D. Texas,
Austin Division.
Scott Louis PANETTI, Petitioner,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.
No. A-04-CA-042-SS.

Sept. 29, 2004.

Michael Clark Gross, Law Office of Michael C. Gross, San Antonio, TX, Keith S. Hampton, Attorney at Law, Austin, TX, for Petitioner.

Tina J. Dettmer, Office of the Attorney General, Austin, TX, for Respondent.

ORDER

SPARKS, District Judge.

BE IT REMEMBERED on the 7th day of September 2004 the Court called the above-styled cause for an evidentiary hearing to determine Petitioner's competency to be executed. The parties appeared through counsel, which over the course of two days, presented evidence and oral arguments. Now before the Court is Petitioner's Petition for Writ of Habeas Corpus [# 1]. Having considered the evidence, the arguments of counsel, and the relevant law, the Court now enters the following opinion and orders.

Background

Petitioner Scott Louis Panetti is currently confined on "death row," in the Polunsky Unit of the Texas Department of Criminal Justice (TDCJ). He has been sentenced to

death for murdering Amanda and Joe Alvarado, the parents of his estranged wife, on September 8, 1992. He brought this, his second application[1] for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on January 26, 2004, after his execution date had been set and he had exhausted the available state court procedures, alleging he was incompetent to be executed. Panetti's attorney had filed a motion under Article 46.05 of the Texas Code of Criminal Procedure ("Article 46.05") in state court on December 9, 2003. On December 23, 2003, the state district judge, after considering the exhibits attached to the motion, denied Panetti's motion on the following grounds:

> [T]he Defendant has failed to set forth alleged facts in support of the assertion that the Defendant is presently incompetent to be executed and has failed to make a substantial showing that the defendant is thus incompetent. The court further finds that the Defendant has failed to raise a substantial doubt of the defendant's competency to be executed on the basis of the said motion and attached documents, as required by Article 46.05(d), Tex.Code Crim. Proc.

Panetti filed a motion for stay of execution in this Court in conjunction with his habeas application, arguing this finding is a decision contrary to clearly established Supreme Court

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[1] Panetti filed his first federal habeas petition in 1999, wherein he alleged fourteen grounds for relief, including claims that he was incompetent to waive counsel and incompetent to stand trial, but not that he was incompetent to be executed. *See Panetti v. Johnson,* Cause No. A:99-CA-260-SS (W.D.Tex. Mar. 9, 2001). This Court's opinion was affirmed on appeal. *See Panetti v. Cockrell,* No. 01-50347, 73 Fed.Appx. 78, slip. op. at 6-8 (5th Cir. Jun. 19, 2003).

precedent, and specifically, *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

The issue before this Court in deciding the initial motion to stay was whether reasonable jurists could disagree regarding whether the state court's decision that Panetti had not made a substantial showing of incompetency which would warrant evaluation of two mental health experts was an unreasonable application of *Ford* and its progeny. Initially, however, Panetti and his attorney failed to include with their motion to stay or federal habeas application the Article 46.05 motion filed in the state court or any evidence of Panetti's current mental status. After this Court denied the first motion, counsel for Panetti submitted a copy of the Article 46.05 application along with his first motion for reconsideration. This motion too was denied as Panetti and his attorney still failed to offer any evidence of Panetti's current mental status. Finally, along with a second motion for reconsideration, Panetti presented evidence to support his contention he was presently incompetent to be executed in the form of the report of a clinical and forensic psychologist, Dr. Mark Cunningham, and the affidavit of a law professor, David Dow, each of whom had observed Panetti and concluded that he suffers from delusions that cause him to misunderstand whether and why he will be executed.

Counsel for Panetti informed the Court that the same evidence had been presented to the state court in a renewed motion to determine his competency under Article 46.05. Therefore, the Court held it appropriate that Panetti present his new evidence to the state court first because at that point, the Court was limited by AEDPA to reviewing the reasonableness of the state court's denial of Panetti's Article 46.05 motion based on the evidence it had

before it at the time the state court denied Panettis initial motion in December 2003. However, because the execution was scheduled for the following day, February 5, 2004, the Court stayed the execution for 60 days to allow the state court a reasonable period of time to consider the evidence of Panettis current mental state and decide whether he had "raised a substantial doubt of [his] competency to be executed" and made the requisite showing of incompetency that entitles him to a mental health evaluation by at least two mental health experts under Article 46.05. Tex. Code. Crim. P. Art. 46.05.

Subsequently on February 23, 2004, relying on Article 46.05(f), the state court entered an order appointing psychiatrist Mary Anderson and clinical psychologist George Parker to examine Panetti. By citing Article 46.05(f),[2] Judge Ables implicitly found Panetti had made "a substantial showing of incompetency" with the documentary evidence submitted. On April 28, 2004, the appointed experts filed their joint report concluding Panetti was competent to be executed. Counsel for Panetti was then ordered to raise any other matters regarding competency by May 21, 2004. On that date, Panetti filed objections to the methods and conclusions of the experts and renewed his motions to appoint counsel, hire a mental health

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[2] Tex. Code. Crim. P. Art. 46.05(f) states: "If the trial court determines that the defendant has made a substantial showing of incompetency, the court shall order at least two mental health experts to examine the defendant using the standard described by Subsection (h) to determine whether the defendant is incompetent to be executed." Judge Ables's appointment of experts pursuant to this provision can be contrasted with his disposition of Panettis initial motion to determine competency, which he denied "on the basis of the said motion and attached documents, as required by Article 46.05(d)."

expert, and hire an investigator. He also asked the trial court to hold an evidentiary hearing, which this Court has since held was required under the Supreme Court's decision in *Ford*. However, rather than hold the required evidentiary hearing, on May 26, 2004, Judge Ables entered an order concluding, "[b]ased on the aforesaid doctors' reports, the Court finds the Defendant has failed to show, by a preponderance of the evidence, that he is incompetent to be executed." *Id.*

This Court held, in its July 20, 2004 Order, that the state court's failure to hold a final competency hearing in which Panetti could present his own evidence constituted non-compliance with Article 46.05. Because the state court did not comply with the statute, the Court concluded its findings were not within the safe harbor created by the Fifth Circuit in *Caldwell v. Johnson,* which insulates state proceedings conducted in compliance with Article 46.05 from habeas attacks on the grounds they fall short of what *Ford* requires. 226 F.3d 367, 374 (5th Cir. 2000). This Court further held, since the state court had determined counsel for Panetti had made "a substantial showing of incompetency," its failure to "receive evidence and argument from the prisoner's counsel, including expert psychiatric evidence that may differ from the State's own psychiatric examination," was a violation of due process under *Ford*. 477 U.S. at 427, 106 S.Ct. 2595.

On that basis, the Court set an evidentiary hearing to determine Panetti's competency to be executed, pursuant to *Ford*. The Court appointed counsel and authorized funds so that Panetti could obtain investigative and expert assistance.

I. Standard of Review and Burden of Proof

Ordinarily, the factual findings of a state habeas court are entitled to great deference. For instance, pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), when a petitioner seeks habeas relief in federal court, "[a] state court's findings of fact are presumed to be correct unless the petitioner rebuts the presumption by 'clear and convincing evidence.'" *Patterson v. Dretke,* 370 F.3d 480, 484 (5th Cir. 2004), 28 U.S.C. §2254(e)(1). The Fifth Circuit has expressly held a "state court's determination that a prisoner is competent to be executed is a factual finding entitled to the presumption of correctness under Section 2254(e)(1)." *Patterson,* 370 F.3d at 484; *Barnard v. Collins,* 13 F.3d 871, 874 (5th Cir. 1994). Additionally, no habeas relief may be granted unless the petitioner can show the state court's adjudication of the claim resulted in a decision that was (1) "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or was (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d); *see also Brown v. Cain,* 104 F.3d 744, 749 (5th Cir. 1997), *cert. denied,* 520 U.S. 1195, 117 S.Ct. 1489, 137 L.Ed.2d 699 (1997).

Respondent contends the Court should apply the deferential standards of review codified by the AEDPA in resolving the question of Panetti's competency to be executed. To apply such deference, however, would fly in the face of the Supreme Court's holding in *Ford.* There, seven Justices of the Supreme Court concluded denying a petitioner the right to present, as well as rebut, evidence in making a competency-to-be-executed determination

violates the right to due process. *See Ford,* 477 U.S. at 414-15, 106 S.Ct. 2595 (Marshall, J.) ("[A]ny procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. . . . A related flaw . . . is the denial of any opportunity to challenge or impeach the state-appointed psychiatrists' opinions."); *Id.* at 423, 106 S.Ct. 2595 (Powell, J., concurring) ("As Justice O'CONNOR states, '[i]f there is one fundamental requisite' of due process, it is that an individual is entitled to an 'opportunity to be heard.'"). Justice Powell specifically noted state proceedings deficient in this respect "invite[ ] arbitrariness and error," and on that basis, he concluded no presumption of correctness should attach to the state court findings.

The Court in *Ford* was faced with a prior version of §2254, however, in which the statutory presumption of correctness was expressly made inapplicable in cases in which "the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing." *See* 28 U.S.C. §2254(d), subsequently amended by Antiterrorism and Effect Death Penalty Act (AEDPA) of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (1996); *Ford,* 477 U.S. at 423, 106 S.Ct. 2595. Despite the fact that the current version of the *statute* omits this particular express limitation on the presumption, Justice Powell's holding is still relevant. After all, Justice Powell based his conclusion that no presumption of correctness should attach to the state court's determination, not only on the statute, but also because "[the statutory] standard is no different from the protection afforded by procedural due process." *Id.* at 424, 106 S.Ct. 2595. Because the Court's holding in *Ford* was grounded in part in the Constitution, subsequent

changes to the habeas statute should not alter its determination that no deference may be afforded to state court competency-to-be executed proceedings resulting in a denial to the petitioner of an effective right to participate. One of the primary justifications for the Court's due process holding in *Ford* was the likelihood such proceedings would produce erroneous factual findings. It would be absurd then to presume the correctness of findings that are constitutionally suspect precisely because they are likely to be incorrect. Deference to constitutionally inadequate state court proceedings would only serve to taint this Court's evidentiary proceedings.

Nonetheless, Respondent contends deference is required, relying on *Valdez v. Cockrell*, 274 F.3d 941 (5th Cir. 2001) for its holding that "a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme." *Id.* at 946. Such reliance is misplaced. Although the court in *Valdez* was unwilling to conclude "a full and fair hearing" is a prerequisite to AEDPA deference *generally*, there is no reason to believe that the Fifth Circuit intended to hold the AEDPA somehow overruled the Supreme Court's constitutional holding in *Ford*. This Court concludes that *Ford*, as a matter of due process, demands a de novo review of the petitioner's competency to be executed.

Finally, as to the burden of proof, the Court assumes, without expressly holding, the petitioner must demonstrate, by a preponderance of the evidence, he is incompetent to be executed. In light of the parties agreement at oral argument that a simple preponderance is the relevant standard of proof, as well as the fact that the Court's ultimate findings would remain unchanged if any higher

burden were applied, the Court need not formally reach the issue.

II. The Evidentiary Hearing

This Court, two juries, and various appellate courts have found Panetti to be competent during various stages of the criminal proceedings against him and during his prior efforts to obtain habeas relief. Those determinations, however, did not involve the question of Panettis' competency *to be executed,* nor did they then purport to resolve any doubts that might subsequently arise about his present competency. Nonetheless, those determinations are clearly relevant to the question of his present competency to be executed. As the Supreme Court made clear in *Ford,* such prior findings may serve as the basis of a presumption of a petitioner's competency under state law. In this case, however, since the state court concluded counsel for Panetti made "a substantial showing of incompetency" to overcome the presumption created by the prior adjudications of his mental state, this Court concludes the evidence adduced at the evidentiary hearing in this proceeding should be of primary significance in this case.

This Court called an evidentiary hearing on September 7, 2004, and it lasted two days. Counsel for Petitioner presented the testimony of four expert witnesses: Dr. Mary Alice Conroy, a clinical and forensic psychologist; Dr. Susana Rosin, a clinical psychologist; Dr. Seth Silverman, a psychiatrist; and the aforementioned Dr. Cunningham. The State presented two expert witnesses, Dr. Parker and Dr. Anderson, appointed to evaluate Panetti by the state habeas court, and three fact witnesses, Major Steven Miller, Lieutenant Terri Hill, and Victoria Williams, TDCJ

corrections officers who have had the opportunity to observe Panetti at his place of incarceration, to varying degrees, in recent months and years. All of the expert witnesses based their testimony on their respective meetings with Panetti, interviews with people that know him, and Panettiš medical and custodial records.

The expert witnesses, on both sides, seemed to agree Panetti suffers from some form of mental illness. They disagreed, however, about the extent (and diagnosis) of his illness as well as the extent his illness interferes with his ability to understand the reason for his impending execution. Certain facts may be regarded as established, however. First, the testimony of the witnesses, in sum, supports a finding that Mr. Panetti suffers from some form of mental illness, which some have diagnosed as a schizoaffective disorder. His illness is significantly characterized, first, by tangentiality and loose association, which means his cognitive processes are impaired in such a way that, when he speaks, he often jumps from topic to topic for no apparent reason, and second, by grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs. Although Dr. Parker and Dr. Anderson concluded that some portion of Panettiš behavior could be attributed to malingering, their testimony merely casts doubt on the extent of Panettiš mental illness and symptoms, as they too concluded that his illness was at least, to some degree, genuine.

Each of the expert witnesses weighed in on his or her view of Panettiš understanding of the fact he is to be executed and the reason for it. All agreed Panetti understands he is going to be executed and, at least implicitly, they agreed he is capable of understanding that fact.

Despite their converging points of view on this basic point, their opinions diverged on a number of other points.

There was disagreement among Panettis own witnesses about whether Panetti has an understanding of the murders he committed. Dr. Conroy stated Panetti would say almost nothing about the subject, and what he did say came across as rather garbled. Nonetheless, she was able to testify, he seemed to be saying that God had nullified it, God had forgiven him, God had wiped the slate clean – in fact he uses the phrase wiped the slate clean –and it would be sinful to talk about that because its no longer an issue."Dr. Rosin testified so mewhat more clearly Panetti knows he killed his wifes parents, basing her conclusion on details of the murders that he went over with her during their meeting. Dr. Silverman testified, on the other hand, that Panetti told him he believed another individual named Sarge committed the murders of his in-laws, and Panetti took no responsibility for them. Dr. Silverman also indicated he did not find it unusual for three different people asking the same question to get three different answers from someone with Panettis condition.

The witnesses further disagreed about whether Panetti understands the reason he is being executed. Significantly, no witness was able to state as a matter of fact that Panetti understands he is being executed for the murders he committed. Dr. Parker and Dr. Anderson both testified Panetti has the capacity to understand this fact but were unable to reach a formal conclusion that he did, in fact, understand it. Their inability to reach this formal conclusion apparently can be largely attributed to the fact Panetti did not tell them he understood he was to be

executed for committing the murders during their interview with him.[3] Dr. Parker and Dr. Anderson based their view that Panetti is capable of understanding the reason for his execution on their determinations about his cognitive functionality generally. For example, Dr. Parker testified that in letters Panetti writes to friends and family, he often communicates lucid, socially appropriate thoughts. Dr. Anderson testified that although many of Panettis responses to her questions in their meeting were abstract and indirect, she regarded them as logical. She further stated Panettis "capacity to understand the Bible, to understand history, movies, other things that he referenced, tells me he has the capacity to understand the facts of why hes being executed." The observations of Major Miller, Lieutenant Hill, and Ms. Williams corroborate Dr. Parkers and Dr. Andersons view that at least some of the time, Panetti is capable of communicating, and apparently understanding, in a coherent fashion.

The witnesses for Panetti did not dispute he has the cognitive functionality to communicate coherently much of

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[3] Dr. Parker and Dr. Anderson regarded Panettis failure to confess this understanding as deliberate manipulation and uncooperativeness. However, based on the testimony of the other witnesses who have interviewed him as well as TDCJ records, there is little evidence to suggest that Panetti behaved any differently with Dr. Parker and Dr. Anderson than he has with any other mental health professional who has interacted with him. Specifically, each witness testified Panetti told them he believes that he is to be executed for preaching the Gospel. Dr. Parker and Dr. Anderson treated this answer as nonresponsive while the others were willing to regard it as a product of a genuine delusion on Panettis part. The consistency of Panettis behavior does not necessarily serve to disprove Dr. Parkers and Dr. Andersons contention that Panettis behavior can be partially attributed to malingering, but it at least rebuts Respondents insinuation that Panetti only refused to talk with *his* experts.

the time. Their testimony about his condition was that, despite the fact he can think and communicate coherently about certain subjects and in certain environments, he suffers from delusions about the world around him. Significantly, they testified he suffers from the delusion that the real reason for his execution is his preaching the Gospel. Dr. Conroy testified Panetti believes his execution is part of a "spiritual warfare" which has been going on since the 1980s.

Dr. Conroy and Dr. Rosin both testified, despite his delusions, Panetti understands the State's stated reason for seeking his execution is for his murders. They based this testimony on what Panetti told them in their meetings with him. Ultimately, both concluded, however, Panetti does not appreciate the connection between his crimes and his execution. They apparently reached this conclusion from the premise that, as a result of his delusions of persecution, he disbelieves the State's stated reason for executing him. Dr. Silverman testified that in his view, Panetti does not associate his execution with the murders he committed in any way. This view was informed, however, at least in part, by the fact that Panetti did not specifically tell Dr. Silverman he understands the State's stated reason for seeking his execution.

Dr. Cunningham testified, although Panetti understands that the State of Texas is going to execute him, his delusions prevent him from recognizing the State as "a lawfully constituted authority." Rather, according to Dr. Cunningham, Panetti sees the State "as being in league with the forces of evil to prevent him from preaching the Gospel."

III. *Competency to be Executed*

The Fifth Circuit has set forth the standard for competency to be executed as follows: "[A]ll we require is that a person know the fact of his impending execution and the reason for it." *Fearance v. Scott,* 56 F.3d 633, 640 (5th Cir. 1995) (citing *Barnard,* 13 F.3d at 876 n. 2). Counsel for Panetti do not dispute Panetti knows the fact of his impending execution. Their contention is Panetti's incompetency is grounded in his failure to understand the reason for his execution. As to that portion of the incompetency test, the facts of this case arguably require a more nuanced standard than what has developed by any federal appellate court to date. There is evidence in the record to support a finding that Panetti is *capable* of understanding the reason for his execution, as well as evidence to support a finding that, in fact, he does understand (at least at some level) *the state's stated reason* for his execution. Nonetheless, the record also would support a finding, not necessarily inconsistent with the first two, that in another possibly relevant sense, Panetti does not, in fact, know or understand the reason for his execution.

The Fifth Circuit cases dealing with competency to be executed are less than clear about *how* a district court is to apply the standard in a factually complex case such as this one. First, although the Fifth Circuit in both *Fearance* and *Barnard* at some point stated the appropriate question is simply whether a petitioner *knows* the fact of and reason for his execution, at other points, the court has also suggested the inquiry might involve a more substantial determination than what the petitioner factually knows. For example, the court has at least purported to adopt the standard enunciated by Justice Powell's concurring opinion

in *Ford,* which sets out the required mental state of a person to be executed in somewhat more detail:

> If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied, and only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

See Garrett v. Collins, 951 F.2d 57, 59 (5th Cir. 1992) and *Lowenfield v. Butler,* 843 F.2d 183, 187 (5th Cir. 1988) (both quoting and relying on this excerpt from Justice Powell's concurrence in *Ford,* 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring), in denying competency-to-be-executed habeas relief); *see also Fearance,* 56 F.3d at 640 and *Barnard,* 13 F.3d at 876 n. 2 (holding that the Fifth Circuit has adopted the Powell concurrence as the standard for competency to be executed).

Counsel for Panetti suggests this Court should treat Justice Powell's concurrence in *Ford* as controlling law. However, despite the fact the Fifth Circuit has purported to adopt Justice Powell's concurrence, it is clear from the court's holdings it has adopted his standard only in a limited sense, and furthermore, it has not adopted his reasoning at all. Justice Powell's proposed standard that only those who are "unaware of the punishment they are about to suffer and why they are to suffer it" are incompetent to be executed, standing alone, is somewhat ambiguous. On the one hand, as discussed further below, the Fifth Circuit has, without any discussion of the potential broader import of the statement, apparently interpreted

Justice Powell's use of the concept of "awareness why" to require no more than knowledge of the required factual predicate for an execution. On the other hand, at least one federal district court has pointed out that Justice Powell's use of the term "why," outside the context of his argument and if interpreted broadly, could be stretched to require even that a defendant receives a metaphysical explanation for his punishment.[4] Justice Powell's reasoning, which gives context to his proposed holding, however, makes clear that, at least for him, the requirement that defendants have an awareness of why they are to suffer execution derives directly from the proposition that "the retributive goal of the criminal law is satisfied" when the defendant "perceives the connection between his crime and his punishment." In this sense, counsel for Panetti are correct to suggest the Powell concurrence requires more than a bare factual knowledge of the reason for execution -rather, it requires that petitioner's understanding of the reason for his punishment is sufficiently clear that the retributive goal of the law may be satisfied. Ultimately, however, Petitioner's problem is that the Powell concurrence is not, in fact, controlling law.

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[4] The Court there wrote:

> The defendant cannot be entitled to such an explanation. Metaphysics is not sufficiently advanced to provide a satisfactory rationale. Moreover, a fundamental notion of justice prevents the defendant from receiving this reasoning. An ordinary person, who never possessed the tenacity to kill another human, may contact a fatal disease. This person will never understand why he is to die. . . . If the innocent person cannot receive this explanation, why should an individual who made a conscious decision to end another human's life?

Martin v. Dugger, 686 F.Supp. 1523, 1571 & n. 21 (S.D.Fla.1988).

As a number of courts have pointed out, Justice Powell's concurrence in *Ford* was decisive in that, in conjunction with Justice Marshall's plurality opinion, it gave rise to a majority holding in the case. However, the opinions of the plurality and Justice Powell converged only with respect to two holdings: (1) that the Eighth Amendment prohibits execution of the insane and (2) that the state procedures for determining competency at issue in the case did not meet the requirements of due process. *Ford,* 477 U.S. at 418, 424, 106 S.Ct. 2595. The plurality represented by Justice Marshall specifically declined to reach a holding on the question of what standard should be used to determine incompetency for the purposes of the Eighth Amendment prohibition. *See id.* at 418, 106 S.Ct. 2595 (Powell, J., concurring) ("The Court's opinion does not address [the meaning of insanity in the context of the Eight [sic] Amendment prohibition]"). Thus, the Powell concurrence does not operate as binding Supreme Court precedent on what standard governs competency to be executed.

Furthermore, although the Fifth Circuit has purported to adopt the Powell concurrence without any apparent express limitation, its holdings suggest it has not adopted Justice Powell's "retributive goal" requirement. This Court can find no instance in which the Fifth Circuit has suggested, other than its quotation of the language of the Powell concurrence, that the competency inquiry includes a determination of whether the petitioner's knowledge or understanding of the reason for his execution is sufficient to permit the court to conclude that the retributive goal of the criminal law may be satisfied. Had the court applied this "retributive goal" standard, at least some of its cases may have come out differently. In *Fearance,* for instance, the court held the following facts,

standing alone, were sufficient to establish competency to be executed: "Petitioner testified that he knew the date scheduled for his execution, the date of the offense for which he was on death row, that he was sentenced to die for murdering Larry Faircloth, and that the murder was alleged to have occurred during the course of a burglary." *Fearance*, 56 F.3d at 640. The court made clear no further inquiry into the petitioner's knowledge or understanding of his execution or the reason for it was required. *Id.*

The Fifth Circuit in *Barnard* was forced to deal with the competency of a petitioner who, like Panetti, suffered from delusions of persecution. There, the state habeas court had found the petitioner in the case's "perception of the reason for his conviction and impending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals and the Mafia." *Barnard*, 13 F.3d at 876. Despite the fact the petitioner's understanding of the reason for his execution was impaired by delusions, the Fifth Circuit concluded his knowledge of the relevant factual predicate, that "his pending execution was because he had been found guilty of that crime," was sufficient to support the state court's legal conclusion he was competent to be executed. *Id.* Although the court stated it was following the Powell concurrence in reaching its conclusion that the standard for competency had been satisfied, it did not even suggest the presence of an issue with respect to its "retributive goal" aspect. *Id.* Had the court determined the "retributive goal" inquiry was required, the result it reached may have been different. At the very least, the state court's findings with respect to the petitioner's delusions would have given rise to an arguable issue about whether his understanding of

the reason for his execution was so distorted that the retributive goal of the law would not be satisfied by his execution.

Ultimately, the Fifth Circuit test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution. Turning now to the case before it, the Court finds the following facts to be established:

> First, Panetti is aware he is to be executed. This fact is undisputed, and each of the expert witnesses agreed he is aware of his impending execution.

Second, although there was some disagreement on this point, Panetti is aware he committed the murders that serve as the basis for his execution. Dr. Conroy and Dr. Rosin both testified Panetti knows he murdered his in-laws. However, Dr. Silverman expressed doubt about this. The Court notes Dr. Silverman seemed to base his doubts, in large part, on the fact Panetti did not demonstrate his awareness by stating he committed the murders during the course of their interview. The fact Panetti did not make such a statement in the course of a single interview is insufficient to demonstrate by a preponderance of the evidence he is unaware of the crimes he committed.

Finally, Panetti understands the State's stated reason for executing him is that he committed two murders. Again, both Dr. Conroy and Dr. Rosin offered testimony Panetti was aware of this fact. Dr. Silverman, though, disagreed on this point too. However, his conclusion Panetti does not understand the State's stated reason for his execution is inextricably intertwined with his determination Panetti is not even aware he committed the murders for

which he is to be executed. Since the Court disagrees with the predicate of Dr. Silverman's determination on this question, it accords his ultimate conclusion little weight.

Dr. Cunningham's testimony, on the other hand, raises a somewhat more difficult issue on this point. He suggests Panetti does not even understand that the State of Texas is a lawfully constituted authority, but rather, he believes the State is in league with the forces of evil that have conspired against him. His testimony is consistent with that of Dr. Conroy, Dr. Rosin, and Dr. Silverman, each of whom testified Panetti believes the real reason he is to be executed is for preaching the Gospel. However, as discussed above, under the precedent of the Fifth Circuit, a petitioner's delusional beliefs -even those which may result in a fundamental failure to appreciate the connection between the petitioner's crime and his execution -do not bear on the question of whether the petitioner knows the reason for his execution for the purposes of the Eighth Amendment.

Because the Court finds that Panetti knows he committed two murders, he knows he is to be executed, and he knows the reason the State has given for his execution is his commission of those murders, he is competent to be executed.

In accordance with the foregoing:

IT IS ORDERED Panetti's Petition for Writ of Habeas Corpus [# 1] is DENIED.

IT IS FURTHER ORDERED the execution of Scott Louis Panetti shall be stayed pending the outcome of the appeal in this case.

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448 F.3d 815

United States Court of Appeals, Fifth Circuit.
Scott Louis PANETTI, Petitioner-Appellant,
v.
Doug DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent-Appellee.
No. 04-70045.

May 9, 2006.

Michael Clark Gross, San Antonio, TX, Keith S. Hampton (argued), Hampton Law Office, Austin, TX, for Panetti.

Tina J. Dettmer (argued), Austin, TX, for Dretke.

Appeal from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, GARZA and STEWART, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Scott Louis Panetti was convicted of capital murder in the state court of Texas and sentenced to death. Panetti argues that he is presently incompetent to be executed. Based on a Certificate of Appealability issued by the district court, Panetti appeals the district court's denial of federal habeas relief.

I

Panetti has been sentenced to death in Texas state court for murdering his wife's parents. Shortly before his scheduled execution date, he petitioned the state court for a determination of his competency to be executed. The state habeas court appointed two mental health experts:

Mary Anderson, a psychiatrist, and George Parker, a clinical psychologist. Anderson and Parker filed a joint report, concluding that Panetti knows that he will be executed and that he has the ability to understand the reason he is to be executed. Based on this report, but without holding a competency hearing, the state habeas court held that Panetti was competent to be executed.

Panetti petitioned for a writ of habeas corpus in federal court. The district court held that the state court's failure to hold a competency hearing at which Panetti could present evidence was contrary to *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). On that basis, the district court held an evidentiary hearing and declined to defer to the state court's finding of competency. Panetti presented the testimony of four expert witnesses: Mary Alice Conroy, a clinical and forensic psychologist; Susana Rosin, a clinical psychologist; Seth Silverman, a psychiatrist; and Mark Cunningham, a clinical and forensic psychologist. The State presented Parker and Anderson's expert testimony, as well as three fact witnesses who had observed Panetti during his period of incarceration.

The district court found that Panetti suffered from "some form of mental illness," which some of the doctors diagnosed as schizoaffective disorder. *Panetti v. Dretke,* 401 F.Supp.2d 702, 707 (W.D.Tex. 2004). Although he has the "cognitive functionality to communicate coherently much of the time," *id.* at 708, he suffers from "grandiosity and a delusional belief system in which he believes himself to be persecuted for his religious activities and beliefs," *id.* at 707. In particular, Panetti told the doctors who interviewed him that he believes the State is "in league with the forces of evil to prevent him from preaching the Gospel." *Id.*

at 709. Nevertheless, the district court found based on the testimony of the experts that Panetti is aware that he will be executed, that he committed the murders for which he was convicted and sentenced to death, and that the State's stated reason for exec uting him is that he committed two murders." *Id.* at 711. On this basis, the district court held that Panetti was competent to be executed. *Id.*

II

In a habeas corpus appeal, we review the district court's findings of fact for clear error and its conclusions of law *de novo. Ramirez v. Dretke,* 396 F.3d 646, 649 (5th Cir. 2005). The district court in this case declined to apply the deferential standard of review ordinarily required by the Anti-terrorism and Effective Death Penalty Act ("AEDPA") because the state court failed to hold an evidentiary hearing as contemplated by *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). Because we affirm the judgment of the district court, we need not decide whether this was error.[1]

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[1] The respondent relies on *Valdez v. Cockrell,* 274 F.3d 941, 946 (5th Cir. 2001), in which we held that "a full and fair hearing is not a prerequisite to the operation of AEDPA's deferential scheme."Accordingly, he argues that the state court's finding that Panetti is competent is entitled to deference even though it may have been made without a hearing. Panetti relies on *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986), a pre-AEDPA case in which a plurality of the Supreme Court stated

> any procedure that precludes the prisoner or his counsel from presenting material relevant to his sanity or bars consideration of that material by the factfinder is necessarily inadequate. "[T]he minimum assu rance that the life-and-death guess will be a truly informed guess requires respect for the

(Continued on following page)

Panetti argues that the district court employed an erroneous legal standard in evaluating whether he was competent to be executed. The district court held that it is sufficient that Panetti knows: 1) that he committed two murders; 2) that he will be executed; and 3) that the reason the state has given for that execution is his commission of those murders. Panetti argues that the Eighth Amendment forbids the execution of a prisoner who lacks a rational understanding of the State's reason for the execution. Panetti contends that this understanding is lacking in his case because he believes that, although the State's purported reason for the execution is his past crimes, the State's real motivation is to punish him for preaching the Gospel. Panetti argues that this rule is compelled by *Ford v. Wainwright,* 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986).

In *Ford,* the Supreme Court held that Florida's procedure by which the Governor determined a prisoner's competency in an *ex parte* proceeding violated due process. The standard employed under Florida's statute was whether the defendant had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him." *Id.* at 403-04, 106 S.Ct. 2595 (quoting Fla. Stat. §922.07(2)). A psychiatrist who had interviewed Ford testified that he had "no understanding

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basic ingredient of due process, namely, an opportunity to be allowed to substantiate a claim before it is rejected."

Id. at 414, 106 S.Ct. 2595 (quoting *Solesbee v. Balkcom,* 339 U.S. 9, 23, 70 S.Ct. 457, 94 L.Ed. 604 (1950) (Frankfurter, J., dissenting)). Justice OConnor, joined by Justice White concurred, stating that due process required providing such a prisoner the opportunity to be heard. *Id.* at 429-30, 106 S.Ct. 2595 (OConnor, J., concurring).

of why he was being executed, made no connection between the homicide of which he had been convicted and the death penalty, and indeed seriously believed that he would not be executed because he owned the prisons and could control the Governor through his mind waves." *Id.* at 403, 106 S.Ct. 2595. A majority of the Court held that the Eighth Amendment barred executing the insane and that Florida's *ex parte* procedure violated due process. A four member plurality stated that, "It is no less abhorrent today than it has been for centuries to exact in penance the life of one whose mental illness prevents him from comprehending the reasons for the penalty or its implications." *Id.* at 417, 106 S.Ct. 2595. The plurality based its statement on the lack of "retributive value [in] executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life" and "the natural abhorrence civilized societies feel at killing one who has no capacity to come to grips with his own conscience or deity." *Id.* at 409, 106 S.Ct. 2595. The Court remanded for a *de novo* evidentiary hearing. *Id.* at 418, 106 S.Ct. 2595. The majority did not, however, address what competency standard the Eighth Amendment required.

Justice Powell, believing that the plurality's exposition of the appropriate standard was inadequate, wrote a concurring opinion. After surveying the historical authorities, Justice Powell wrote:

> A number of States have more rigorous standards, but none disputes the need to require that those who are executed know the fact of their impending execution and the reason for it.
>
> Such a standard appropriately defines the kind of mental deficiency that should trigger the

> Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it.

Id. at 421-22, 106 S.Ct. 2595 (Powell, J., concurring) (footnote omitted).[2] Justice Powell believed that Ford was incompetent under this standard because he did not actually believe that he would be executed. *Id.* at 422, 106 S.Ct. 2595 (Powell, J., concurring). We subsequently adopted Justice Powell's concurrence as the correct standard. *Lowenfield v. Butler,* 843 F.2d 183, 187 (5th Cir. 1988).

The district court in this case relied on *Barnard v. Collins,* 13 F.3d 871 (5th Cir. 1994), a case nearly identical to the one at bar. Barnard sought a certificate of probable cause on his *Ford* claim. *Id.* at 875. Barnard, like Panetti, suffered from paranoid delusions that his execution was the result of a conspiracy against him and not his crimes. As the state court noted:

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[2] A majority of the court recited Justice Powell's position approvingly in *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), *abrogated on other grounds by Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), for the proposition that a person "who is unaware of the punishment they are about to suffer and why they are to suffer it cannot be executed." *Id.* at 333, 109 S.Ct. 2934 (quoting *Ford,* 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring)).

> [Barnard] comprehends the *nature, pendency, and purpose of his execution.* [Barnard] knows that he was found guilty of killing a young boy in a robbery in Galveston County and that *his pending execution was because he had been found guilty of that crime.* He knew of the date of his scheduled execution and that it would be lethal injection by use of an intravenous injection. [Barnard's] experts do not establish that he is unaware of the fact of or the reason for his impending execution, but rather that his perception of the reason for his conviction and pending execution is at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia (emphasis added).

Id. at 876 (quoting state court decision). We held that because the state court found that Barnard "knew that he was going to be executed" and why he was going to be executed" the *Ford* standard had been satisfied. *Id.* at 877.[3] The district court's findings in this case are sufficient under *Barnard* to establish Panetti's competency to be executed, and Panetti does not seriously contend otherwise.

Panetti nevertheless argues that *Barnard* is inconsistent with our prior decisions in *Johnson v. Cabana,* 818 F.2d 333 (5th Cir. 1987), *Lowenfield v. Butler,* 843 F.2d 183

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[3] In a subsequent case, this court held that where a prisoner "testified that he knew the date sche duled for his execution, the date of the offense for which he was on death row, that he was sentenced to die for murdering Larry Faircloth, and that the murder was alleged to have occurred during the course of a burglary," he was competent to be executed. *Fearance v. Scott,* 56 F.3d 633, 640 (5th Cir. 1995).

(5th Cir. 1988), and *Garrett v. Collins*, 951 F.2d 57 (5th Cir. 1992), and with Justice Powell's concurrence in *Ford*. We disagree. One panel of this court is generally powerless to overrule the previous decision of another panel. Although we acknowledge that an exception to this rule arises where two panel opinions are in conflict, *Harvey v. Blake*, 913 F.2d 226, 228 n. 2 (5th Cir. 1990), the holdings of our cases are not in conflict.

Barnard is consistent with Justice Powell's concurrence in *Ford*. Justice Powell stated, "I would hold that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Ford*, 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring). Justice Powell did not state that a prisoner must "rationally understand" the reason for his execution, only that he must be "aware" of it.

This court first interpreted the "awareness" component of *Ford* in *Johnson v. Cabana*, 818 F.2d 333 (5th Cir. 1987). The issue in *Johnson* was whether the Mississippi state court erred in declining to hold an evidentiary hearing on Johnson's *Ford* claim. Johnson had submitted to the state court evidence that he suffered from various psychological difficulties including amnesia, brain damage, "brain dysfunction," organic brain syndrome, and alcohol dependency, and that he heard voices when he was a child. *Id.* at 337-39. The state court had held that Johnson had not made a sufficient threshold showing that would entitle him to a full hearing. *Id.* at 339. In making that determination, the state court employed a substantially more stringent definition of competency than *Ford* required. *Id.* at 339. Mississippi deemed a prisoner incompetent for execution if he did not have sufficient intelligence

to understand: 1) the nature of the proceedings against him; 2) the crime of conviction; 3) the purpose of the punishment; 4) his impending fate; or 5) any fact that might exist that would render his punishment unjust or unlawful. *Id.* (citing Miss. Code Ann. §99-19-57(2) (Supp.1986)). This court held that Johnson's evidence as to whether he met this standard was equivocal. *Id.* at 340. Accordingly, the failure to hold a full, trial-like hearing did not violate due process. *Id.*

Panetti makes much of *Johnson's* discussion of the *Ford* standard for competency. *Johnson* did state that in *Ford,* "the Supreme Court held that a defendant who could not perceive the connection between his crime and punishment should not be executed." *Id.* at 336. But our interpretation of *Ford's* substantive competency standard was dicta because as noted, Mississippi's standard was more prisoner-friendly than the Eighth Amendment requires. The issue in *Johnson* was, given the Mississippi standard, whether Johnson had a due process right to a full hearing. *See id.* at 340 ("We therefore find that constitutional due process was satisfied by the determination of the Mississippi Supreme Court that its statutory threshold had not been reached is entitled to the presumption of correctness provided by [former] 28 U.S.C. §2254(d).") The constitutional standard for competency to be executed was simply not at issue in *Johnson,* much less the highly unusual factual scenario in this case. Because Johnson had failed to make a threshold showing under the Mississippi standard, the standard applied by the district court in this case, or the standard that Panetti advocates, *Johnson* did not resolve the issue in this appeal.

We next addressed *Ford* in *Lowenfield v. Butler,* 843 F.2d 183 (5th Cir. 1988), which like *Johnson,* concerned

whether the petitioner had made a substantial threshold showing to require a full hearing in state court. According to *Lowenfield,* the *Ford* plurality stated that a prisoner's competency to be executed depends on whether he "comprehends the nature of the penalty' and whether the prisoner's mental illness prevents him from comprehending the reasons for the penalty or its implications.'" *Id.* at 187 (quoting *Ford,* 477 U.S. at 417, 106 S.Ct. 2595). *Lowenfield* then quoted Justice Powell's concurrence for the proposition that the Eighth Amendment forbids the execution of "those who are unaware of the punishment they are about to suffer and why they are to suffer it." *Id.* (quoting *Ford,* 477 U.S. at 422, 106 S.Ct. 2595 (Powell, J., concurring)). Lowenfield's evidence consisted only of a psychologist's opinion that he was a paranoid schizophrenic. *Id.* at 187. By itself, this fell "woefully short of a finding that Lowenfield [was] so deranged that he [was] unaware that he [was] about to be put to death as a result of his earlier conviction and sentence for murder." *Id.* Accordingly, we held that Lowenfield had failed to meet the substantial threshold showing required to necessitate a full hearing. *Id.* at 187-88.

Despite Panetti's reliance on *Lowenfield,* the case is not dispositive. Mere evidence of schizophrenia would not establish that a prisoner was incompetent under either the test that Panetti advocates or the test applied by the district court. *Lowenfield* therefore did not address or resolve whether competency requires a rational understanding of the reason for the execution.

Panetti relies last on *Garrett v. Collins,* 951 F.2d 57 (5th Cir. 1992). *Garrett* concerned an appeal from a stay of execution. Garrett contended that his belief that "his dead aunt [would] protect him from the effects of the sedative

and toxic agents used" during lethal injection rendered him incompetent. *Id.* at 58. Garrett's expert witness testified, however, that his client knew that it was possible for him to die as a result of the State's efforts. *Id.* at 59. We held that, so long as Garrett "(1) understands the nature of the proceedings against him and (2) understands that the state is seeking to execute him and the reasons the state seeks this penalty," he is competent to be executed. *Id.* at 58. That Garrett had some hope that his aunt would save him from death did not render him incompetent. *Id.* at 59. In *Garrett,* we did not address the arguments Panetti raises in this appeal. Garrett solely argued that he lacked an understanding of the nature of the death penalty. He did not contend, nor did we decide what it means for a prisoner to be unaware of the punishment or the reason for it. Because we hold that "awareness," as that term is used in *Ford,* is not necessarily synonymous with "rational understanding," as argued by Panetti, we conclude that the district court's findings are sufficient to establish that Panetti is competent to be executed. *See Barnard v. Collins,* 13 F.3d 871 (5th Cir. 1994).

For these reasons, we AFFIRM the judgment of the district court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-70045

SCOTT LOUIS PANETTI

Petitioner-Appellant

v.

DOUG DRETRE, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee

Appeal from the United States District Court
for the Western District of Texas, Austin

ON PETITION FOR REHEARING EN BANC

(Opinion 5/9/06, 5 Cir., ___, ___ F.3d ___)

(Filed Jun. 8, 2006)

Before HIGGINBOTHAM, GARZA, and STEWART, Circuit Judges.

PER CURIAM:

(✓) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P.

127 S.Ct. 852

Supreme Court of the United States
Scott Louis PANETTI, petitioner,
v.
Nathaniel QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division.
No. 06-6407.

Jan. 5, 2007.

Case below, *Panetti v. Dretke*, 448 F.3d 815.

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.